

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 746

MITCHELL, SECRETARY OF LABOR, PETITIONER,

vs.

ROBERT DeMARIO JEWELRY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Original Print

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A

(Omitted in printing)

IN UNITED STATES OF AMERICA,
UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT

PLEAS AND PROCEEDINGS had and done at a regular term of the United States Court of Appeals for the Fifth Circuit, begun on the first Monday in October, A. D., 1958, before the Honorable Joseph C. Hutcheson, Jr., Chief Judge, the Honorable Elbert P. Tuttle and the Honorable Warren L. Jones, Circuit Judges:

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor, *Appellant & Cross-Appellee,*

versus

ROBERT DEMARIO JEWELRY, INC., and ROBERT DEMARIO, an individual, *Appellees & Cross-Appellants.*

(And reverse title)

BE IT REMEMBERED, That heretofore, to-wit on the 24th day of January, A. D., 1958, a transcript of the record in the above styled cause, pursuant to an appeal and cross-appeal from the United States District Court for the Middle District of Georgia, was filed in the office of the Clerk of the said United States Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Court of Appeals as No. 17068, as follows, to-wit:—

B

(File endorsement omitted)

1 IN UNITED STATES DISTRICT COURT FOR THE
 MIDDLE DISTRICT OF GEORGIA
 COLUMBUS DIVISION

Civil Action No. 667

JAMES P. MITCHELL, Secretary of Labor, United States
Department of Labor, *Plaintiff*

v.

ROBERT DEMARIO JEWELRY, INC., A Corporation and
ROBERT DEMARIO, and Individual, *Defendants*

Complaint—Filed May 17, 1957

I

Plaintiff brings this action to enjoin the defendants from violating the provisions of Section 15 (a) (3) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, U. S. C. Title 29, Sec. 201, *et seq.*), hereinafter referred to as the Act.

II

Jurisdiction of this action is conferred upon the court by Section 17 of the Act.

III

Defendant Robert DeMario Jewelry, Inc., is now, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Georgia with an office and principal place of business at Fort Gaines, Georgia, within the jurisdiction of this court. The defendant Robert DeMario is a resident of Fort Gaines, Georgia, within the jurisdiction of this court.

IV

The defendant Robert DeMario is now and has been an officer of the defendant Robert DeMario Jewelry, Inc., owning 98% of its stock and at all times hereinafter alleged supervised, directed and controlled the employees of said corporation and acted directly in the interest of said corporate defendant in relation to its employees and was at

all times alleged in this complaint an employer within the meaning of the Act.

V

Defendants, during the times hereinafter mentioned, were engaged in the manufacture, sale and distribution of costume jewelry at Fort Gaines, Georgia. Substantial amounts of said goods have been, and are being, produced for commerce within the meaning of the Act, and have; and are being sold, shipped, delivered, transported and offered for transportation from defendants' said place of business to other States.

VI

(a) At all times hereinafter mentioned the defendants employed Elizabeth Dukes in and about their said place of business in Fort Gaines, Georgia, in the production of goods, to-wit, costume jewelry, for commerce within the meaning of the Act.

(b) Heretofore, on or about the 2nd day of November, 1956, the said Elizabeth Dukes requested in writing that the Secretary of Labor, United States Department of Labor, represent her in a claim for back wages against Robert DeMario Jewelry, and on the 14th day of November, 1956, the plaintiff herein instituted action pursuant to said request by virtue of the authority contained in Section 16 (c) of the Act. Thereafter, the defendants unlawfully pursued a course of discrimination against the said Elizabeth Dukes and on or about the 30th day of November, 1956, did discharge her from their employment because the said employee had filed said request and complaint and caused to be instituted the action heretofore alleged, and the defendants have failed, and continue to fail, to employ the said employee herein named. By discriminating against and discharging the said Elizabeth
3 Dukes, as aforesaid, and continuing to fail to employ her, the defendants have violated, and continue to violate, Section 15 (a) (3) of the Act.

VII

(a) At all times hereinafter mentioned the defendants employed Maebelle Giles in and about their said place of

business in Fort Gaines, Georgia, in the production of goods, to-wit, costume jewelry, for commerce within the meaning of the Act.

(b) Heretofore, on or about the 6th day of November, 1956, the said Maebelle Giles requested in writing that the Secretary of Labor, United States Department of Labor, represent her in a claim for back wages against Robert DeMario Jewelry, and shortly thereafter said defendants learned of the submission of said request and thereupon unlawfully embarked upon a course of discrimination against the said Maebelle Giles and on or about the 27th day of November, 1956, did discharge her from their employment because the said employee had filed said request and complaint, and the defendants have failed, and continue to fail, to employ the said employee herein named. By discriminating against and discharging the said Maebelle Giles, as aforesaid, and continuing to fail to employ her, the defendants have violated and continue to violate Section 15 (a) (3) of the Act.

VIII

(a) At all times hereinafter mentioned the defendants employed Paralee Pate in and about their said place of business in Fort Gaines, Georgia, in the production of goods, to-wit, costume jewelry, for commerce within the meaning of the Act.

(b) Heretofore, on or about the 2d day of November, 1956, the said Paralee Pate requested in writing that the Secretary of Labor, United States Department of Labor, represent her in a claim for back wages against Robert DeMario Jewelry, and on the 14th day of November, 1956, the plaintiff herein instituted action pursuant to said request by virtue of the authority contained in Section 16 (c) of the Act. Thereafter, the defendants unlawfully pursued a course of discrimination against the said Paralee Pate and on or about the 20th day of November, 1956, did discharge her from their employment because the said employee had filed said request and complaint and caused to be instituted the action heretofore alleged, and the defendants have failed, and continue to fail, to employ the said employee herein named. By

discriminating against and discharging the said Paralee Pate, as aforesaid, and continuing to fail to employ her, the defendants have violated, and continue to violate, Section 15 (a) (3) of the Act.

IX

A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

WHEREFORE, cause having been shown, plaintiff prays for judgment permanently enjoining and restraining defendants, their officers, agents, servants, employees and attorneys and all persons acting, or claiming to act, in their behalf and interest, from violating the provisions of Section 15 (a) (3) of the Act, and requiring the defendants further, in good faith, to offer reinstatement in their employment to Elizabeth Dukes, Maebelle Giles, and Paralee Pate and, upon their acceptance, to reinstate them in said employment at rates and under conditions not less favorable to them than prevailed prior to said course of discrimination and their unlawful discharge, and, further, to reimburse the said Elizabeth Dukes, Maebelle Giles, and Paralee Pate in sums equal to the wages lost by them by virtue of said unlawful discharges, and for such further relief as may be necessary and appropriate.

[Signed] STUART ROTHMAN,
'Solicitor,

[Signed] BEVERLY R. WORRELL,
Regional Attorney.

[Signed] M. J. PARMENTER,
Attorney.

UNITED STATES DEPARTMENT
OF LABOR,
Attorneys for Plaintiff.

5 Post Office Address:

U. S. Department of Labor, Office of the Solicitor,
1401 South 20th Street, Birmingham 5, Alabama.

U. S. Department of Labor, Office of the Solicitor,
654 Peachtree—Seventh Building, Atlanta 23,
Georgia.

IN UNITED STATES DISTRICT COURT

Answer of Defendants

1. Defendants admit that plaintiff brings this action but denies any violation as alleged in the complaint.
2. Defendants admit Paragraph II.
3. Defendants admit Paragraph III.
4. Defendants deny Paragraph IV, but admit that Robert DeMario is, and has been since its creation, an officer of defendant corporation, at said times owning 98% of said stock, and that he directed and controlled the employees of said corporation in his capacity as an officer of said corporation.
5. Defendants deny Paragraph V, except to admit that defendant corporation, at the times mentioned in the complaint was engaged in the manufacture of goods being produced for commerce.
6. Defendants deny Paragraph VI, except as follows:
 - (a) Defendants admit that defendant corporation at one time employed the said Elizabeth Dukes in its place of business in Fort Gaines, Georgia in the production of goods for commerce.
 - (b) Defendants admit that on or about November 14, 1956 the plaintiff instituted an action on behalf of said Dukes against these defendants.
 - (c) Defendants can neither admit nor deny, for want of sufficient information, the allegation in the first sentence of Paragraph VI (b) regarding the alleged written request made by said Elizabeth Dukes to the Secretary of Labor.
7. Defendants deny Paragraph VII of the complaint, except as follows:

6 (a) Defendants admit that defendant corporation at one time employed Maebelle Giles in its place of business in Fort Gaines, Georgia in the production of goods for commerce.

 (b) Defendants can neither admit nor deny, for want of sufficient information, the allegation in Paragraph VII (b)

regarding a written request made by said Maebelle Giles to the Secretary of Labor.

8. Defendants deny Paragraph VIII, except as follows:

(a) Defendants admit that defendant corporation at one time employed Paralee Pate in its place of business in Fort Gaines, Georgia in the production of goods for commerce.

(b) Defendants can neither admit nor deny the allegation in Paragraph VIII (b) regarding the written request made by Paralee Pate to the Secretary of Labor.

(c) Defendants admit that on or about November 14, 1956 the plaintiff instituted an action on behalf of the said Paralee Pate against these defendants.

9. Defendants deny Paragraph IX.

WHEREFORE, defendants demand trial by Jury and pray judgment.

STONE & STONE,
MOORE, GIBSON, DELOACHE & GARDNER,
[Signed] R. LAMAR MOORE,
of Counsel.
Attorneys for Robert DeMario and
Robert DeMario Jewelry, Inc., defendants.

P. O. Addresses:

*Blakely, Georgia.
P. O. Box 190, Moultrie, Georgia.
P. O. Box 190, Moultrie, Georgia.

IN UNITED STATES DISTRICT COURT

Findings, Conclusions and Decree—October 8, 1957

BOOTLE, District Judge:

This is an action brought under the authority of Section 17 of the Fair Labor Standards Act, 29 U. S. C. A. 7 217, to enjoin the defendants from violating the provisions of Section 15 (a) (3) of that act, (Title 29, U. S. C. A. 215 (a) (3)), alleging the unlawful discharge

of Elizabeth Duke, Maebelle Giles, and Paralee Pate, praying for an injunction and an order requiring their reinstatement and reimbursement for wages lost by them by virtue of their unlawful discharge.

Findings of Fact

I find the facts to be as follows:

1. Robert DeMario Jewelry, Inc., the corporate defendant, is engaged in the business of manufacturing jewelry at Fort Gaines, Georgia, and has been continuously so engaged since its incorporation on September 19th, 1955. The defendant, Robert DeMario, is president of said corporation and the owner of 98% of its capital stock and in his individual capacity operated the same business at Fort Gaines, Georgia continuously from the month of August, 1953 until the business was incorporated.
2. Elizabeth Duke was an employee of said business continuously for three years and one month immediately prior to November 30th, 1956, when she was laid off. Maebelle Giles was an employee of said business continuously for two years and one month immediately prior to November 20th, 1956, when she was laid off. Paralee Pate was an employee of said business continuously for nine months immediately prior to November 19th, 1956, when her employment was terminated in the manner hereinafter specified.
3. On November 14th, 1956, a number of employees of the corporate defendant, including Elizabeth Duke and Palalee Pate, through the Secretary of Labor, filed a suit in this court against the defendants under and by virtue of the authority of Section 16 (c) of the Fair Labor Standards Act, Title 29, U.S.C.A. 216 (c), for recovery of wages allegedly unpaid. Said suit was served upon the defendants on November 16th, 1956. Maebelle Giles was not named in that action, but was included in a subsequent like suit filed in this court on January 7th, 1957, and Larry Brown, one of the officers of the corporate defendant, learned on November 16th, 1956, when the first suit was served, that Maebelle Giles had filed a request with the Secretary of Labor to represent her in her claim for back wages.

4. Immediately after the service of said suit upon Robert DeMario he became disturbed, excited and displeased with the three employees named because of their having authorized the bringing of said suit. One by one he called them into the restroom in the place of business which was the only available private area for conference in that immediate building and, in substance, asked them why they had authorized the bringing of the suit and protested their having done so.

5. The three employees named were, relatively speaking, long-term employees of the defendants, particularly Elizabeth Duke and Maebelle Giles. Few, if any, employees had worked continuously longer than these two.

6. Because of the defendants' displeasure over the filing of said first mentioned suit and the probability of the filing of said second suit the defendants immediately began discriminating against the three named employees. This discrimination manifested itself in several ways including the changing of seating arrangements of these employees on the following Monday morning, November 19th, giving them less desirable locations or positions in the plant, changing the particular type of work assigned to them, giving instructions that they were not to leave their seats except to go to the restroom and generally finding fault with their work.

7. As a result of said discrimination and nagging on the part of the individual defendant, Paralee Pate, about twelve o'clock, noon, on Monday, November 19th, stated to the individual defendant, "I am leaving and I think you know why". She returned to work at the usual hour next morning, but the defendants refused to admit her to the plant, the individual defendant telling her, in substance, that she had quit the day before.

8. On or about November 28th, 1956, the defendants laid off Maebelle Giles and on or about November 30th, 1956 laid off Elizabeth Duke. At least the defendants told these two employees they were laid off, but they have never been offered reinstatement or re-employment. E. B. Tallmadge, an investigator with the Wage and Hour Division, United States Department of Labor, before

the present action was filed, requested the defendants to reinstate Elizabeth Duke, but the defendants did not agree to do so. The evidence is not entirely clear whether Mr. Tallmadge also requested reinstatement of the other two named employees, the individual defendant having testified that he might have done so. As above stated, Paralee Pate requested the privilege of returning to work the day after her employment was interrupted at noon, but defendants rejected her request.

9. Paralee Pate and Maebelle Giles were at least average workers and Elizabeth Duke was above the average. No complaints had ever been made against the work of any of these three employees. All three of these employees were well liked by the other employees and throughout the trial no serious criticism was made of any of them except that Paralee Pate could be sarcastic toward the individual defendant and another supervisor because of which trait her name had been included on a tentative list prepared prior to November 16th, 1956 of persons who were to be laid off, but after a conference between the individual defendant and some of his key personnel prior to the filing of any of the suits, her name was removed from said list. The names of Maebelle Giles and Elizabeth Duke had never been included on said list.

10. The three named employees would not have been laid off if it had not been for the filing of said suits, or if they had been laid off they would have been reinstated long since. A few other employees were laid off during the months of October, November, and December, 1956, several of those being laid off having less seniority than the three employees named, and some, at least three, of those laid off with less seniority having been re-employed by the defendants.

Conclusions of Law

I arrive at the following conclusions of law:

1. This Court has jurisdiction of this cause. Title 29, U.S.C.A. Section 217.
2. It is unlawful for any person to discharge or in any other manner discriminate against any employee
10 because such employee has filed any complaint, or

instituted, or caused to be instituted, any proceeding under or related to the Fair Labor Standards Act (Title 29, U. S. C. A. Section 215 (a) (3)).

3. The conduct of the defendants as described in the foregoing findings of fact constituted prohibited discrimination against the three employees named as to the treatment of said employees between November 16th, 1956 and the respective dates of the suspension or termination of their employment, as to the suspension or termination of their employment and as to the failure to reinstate or re-employ said employees.

4. The plaintiff in this case, James P. Mitchell, Secretary of Labor, suing on behalf of said three named employees, is entitled to an injunction enjoining the defendants from in any manner discriminating against said three employees and is entitled to a mandatory injunction requiring the defendants to offer said employees reinstatement to the former positions which they held immediately prior to the service of the suit which was served on or about November 16, 1956, which injunction should order the defendants, if need be, to lay off any employees enjoying less seniority than said three employees, seniority to be computed from the date of original employment in each instance. While such injunctions should not issue except in cases where evidence of discrimination is clear and convincing, this case clearly falls in that category. *Walling, Administrator v. O'Grady*, 2nd Cir., 146 F. 2d 422; *McComb v. Frank Scerbo & Sons*, 2nd Cir., 177 F. 2d 137; *Texas & N.O.R. Co. v. Brotherhood Ry. & S. S. Clerks*, 281 U.S. 548, 74 L. Ed. 1034, 1039; *Porter v. Warner Holding Company*, 328 U.S. 395, 90 L. Ed. 1332; *Walling v. Barnesville Farmers Elevator Co.*, 58 F. Supp. 821, D. C. Minnesota, and *Walling v. Phillips & Buttorff Mfg. Co.*; 57 F. Supp. 543, D.C.M.D. Tenn.

5. In this case it is not necessary to determine whether this Court has jurisdiction, in view of the proviso contained in Title 29, U.S.C.A. Sec. 217, reading:

Provided, That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to em-

ployee of unpaid minumum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

to require reimbursement for wages lost by virtue of unlawful lay-offs or discharges inasmuch as in the exercise of the Court's discretion such reimbursement would not be ordered even assuming, without deciding, that the Court would have jurisdiction to order such reimbursement. As to whether or not such jurisdiction exists, see U. S. Code Congressional Service, 81st Congress, First Session, 1949, page 2272 for legislative history of said proviso.

Decree

Whereupon, it is Considered, Ordered, Adjudged, and Decreed as follows:

1. The defendants, Robert DeMario Jewelry, Inc. and Robert DeMario, their officers, agents and employees are hereby permanently enjoined from hereafter discharging, laying off or in any other manner discriminating against Elizabeth Duke, Maebelle Giles and Paralee Pate because of their having instituted or caused to be instituted, any of the litigation referred to in the findings of fact in this case.

2. Said defendants, Robert DeMario Jewelry, Inc. and Robert DeMario are hereby ordered, by and through this mandatory injunction, to offer to said three named employees, Elizabeth Duke, Maebelle Giles and Paralee Pate, reinstatement to their former positions which were held by them immediately prior to the service of said suit, which service took place on or about November 16th, 1956. The defendants are ordered, if need be in order to effect said reinstatement, to lay off any employee or employees having less seniority than Elizabeth Duke, Maebelle Giles and Paralee Pate, seniority in each instance to be measured from date of original employment. Said offers of reinstatement shall be in writing in letter form to be addressed and delivered to said three named employees within ten days from the date hereof, and said employees shall then be allowed a period of ten days within which to accept or reject said offers of reinstatement, and in the event of acceptance by said employees each of them so accepting shall, barring sickness or other unavoidable circumstances,

L

12 be ready and offer to report for work within ten days from the date of receipt by such employee of said offer of reinstatement. Said defendants are ordered to mail to the Clerk of this Court at Macon, Georgia a copy of said offers of reinstatement and said employees are ordered to mail to said Clerk copies of their letters of acceptance or rejection, and said defendants and employees are ordered, separately, to advise the Clerk of this Court in writing at the expiration of the second ten day period above specified whether or not each such employee has been reinstated and if not, why not, which reports, of course, may be prepared and submitted by attorneys for the respective parties.

3. The prayers of the petition with respect to ordering reimbursement for wages lost by virtue of unlawful layoffs or discharges are hereby denied.

4. This Court retains jurisdiction of this cause for the purpose of passing any and all additional orders herein as may, in its judgment, become necessary, for the purpose of modifying the same, if, in its judgment, modification becomes necessary and for the purpose of enforcing the same.

The costs in this case will be taxed and assessed by the Clerk against the defendants.

This 8th day of October, 1957.

[Signed] W. A. Bootle,
United States District Judge.

13 Clerk's Certificate to foregoing transcript omitted in printing.

**Designation of Record for Printing by Appellant and
Cross-Appellee—Filed February 4, 1958**

(Omitted in printing)

15 **Minute Entry of Argument and Submission—
October 6, 1958**

(Omitted in printing)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17068

JAMES P. MITCHELL, Secretary of Labor, United States
Department of Labor, *Appellant and Cross-Appellee,*
versus

ROBERT DEMARIO JEWELRY, INC. and ROBERT DEMARIO,
an Individual, *Appellees and Cross-Appellants.*

(AND REVERSE TITLE.)

*Appeal and Cross-Appeal from the United States District
Court for the Middle District of Georgia.*

Opinion—November 7, 1958

Before HUTCHESON, Chief Judge, and TUTTLE and JONES,
Circuit Judges.

JONES, Circuit Judge: The Secretary of Labor brought
suit in the United States District Court for the
17 Middle District of Georgia, invoking the jurisdiction
conferred by Section 17 of the Fair Labor Standards
Act,¹ against Robert DeMario Jewelry, Inc., a corporation,

¹ "The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have jurisdiction, for cause shown, to restrain violations of section 15; *Provided*, that no court shall have jurisdiction in any action brought by the Secretary of Labor to restrain such violations to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action." 29 U.S.C.A. § 217.

and Robert DeMario who controlled the corporation and owned most of its stock. It was charged by the Secretary that three employees of the jewelry company had been wrongfully discharged in violation of Section 15 of the Act² for having complained to the Secretary that they were not receiving minimum wages. In addition to seeking an injunction, in general terms, against violations of Section 15(a)(3) of the Act, the Secretary prayed that the appellees be required to reinstate the three discharged employees and to reimburse them for wages lost as a result of the wrongful discharges.

The district court entered its decree ordering the reinstatement of the three discharged employees. The district judge indicated a doubt as to whether the court had any power to decree reimbursement for lost wages
18 but found it unnecessary to determine this question

"inasmuch as in the exercise of the Court's discretion such would not be ordered even assuming, without deciding, that the Court would have jurisdiction to order such reimbursement." The Secretary has appealed and urges that the district court erred in refusing to direct the appellees to make reimbursement to the employees for wages lost as a result of their wrongful discharge. The Secretary designated for printing only those portions of the record consisting of the Complaint, the Answer, and the Findings of Fact, Conclusions of Law and Decree. The appellees, saying that the record on appeal is not sufficient to permit a determination of whether there was an abuse of discretion in denying reimbursement, move that the appeal be dismissed.

The printed record is sufficient for our disposition of the case. If the appellees believed that the portion which the appellant designated for printing was inadequate, the rules

² "(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

* * * *

(3) To discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee; * * * 49 U.S.C.A. § 215.

of this Court provide the method by which other portions of the record may be included. 5th Cir. Rule 23.

Section 17 of the Fair Labor Standards Act, as originally enacted, merely conferred jurisdiction upon the district courts to restrain violations of Section 15 of the Act. The limiting proviso was not then a part of the statute. The Eighth Circuit Court of Appeals sustained a consent decree in a suit by the Wage and Hour Administrator directing payment to employees of the defendant of the

difference between wages paid and the amount payable at the prescribed minimum hourly and overtime rates. *Walling v. Miller*, 8th Cir. 1943, 138 F. 2d 629, cert. den. 321 U. S. 784, 64 S. Ct. 781, 88 L. Ed. 1076.

Doubt was expressed as to the authority of the administrator to maintain the suit, but it was found unnecessary to decide the question. One of the judges, in an opinion concurring specially, expressed the opinion that the power given to district courts to restrain violations included the power to direct payments of wage deficiencies unlawfully withheld. Thereafter it was held by the Second Circuit Court of Appeals that in a proceeding brought under Section 17 for the reinstatement of wrongfully discharged employees the court had inherent power to enforce payment of wages lost by the discharge. *Walling v. O'Grady*, 2nd Cir. 1944, 146 F. 2d 422. In support of its decision the court cited and relied upon *Texas & N.O.R. Co. v. Brotherhood of Ry. Clerks*, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034; *Phelps Dodge Corporation v. N.L.R.B.*, 313 U. S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A.L.R. 1217; and the specially concurring opinion in *Walling v. Miller*, *supra*.

The O'Grady case was followed in the Second Circuit by *McComb v. Frank Scerbo & Sons*, 2nd Cir. 1949, 177 F. 2d 137, in which it was held that the district courts had power, in a suit to restrain violations of the minimum wage and hour provisions of the Act, to order restitution of overtime wages. In the opinion of the court it followed, and it recited in its opinion that it was following, its O'Grady case. It quoted from the special concurrence in *Walling v. Miller*, *supra*. The authorities relied upon in the O'Grady

case were cited and also the intervening decision in
20 *McComb v. Jacksonville Paper Co.*, 336 U. S. 187, 69 S. Ct. 497, 93 L. Ed. 599. Cf. *Brotherhood of Ry.*

19

& S.S. Clerks v. Texas & N.O.R. Co., 25 F. 2d 876, affirmed 33 F. 2d 13. The Texas & N.O.R. case and *McComb v. Jacksonville Paper Co.* case involved situations where prior decrees, framed to act prospectively, had not been complied with and contempt proceedings had thereafter been instituted. In the *McComb v. Jacksonville Paper Co.* opinion it was said "We can lay to one side the question whether the Administrator, when suing to restrain violations of the Act, is entitled to a decree of restitution for unpaid wages." It is hornbook law that in a contempt proceedings for the violation of an injunction the court may ascertain damages for the breach and enter judgment for such damages. 12 Am. Jur. 430-432, Contempt § 62. The power of Federal courts to enforce decrees and punish by contempt for their breach is expressly recognized in Rule 70, Fed. Rules Civ. Proc., 28 U. S. C. A. Cf. *National Drying Machinery Co. v. Ackoff*, 3rd Cir. 1957, 245 F. 2d 192, cert. den. 355 U. S. 832, 78 S. Ct. 47, 2 L. Ed. 2d 44; *Phelps Dodge Corp. v. N.L.R.B.* involved the provision of the National Labor Relations Act, 29 U.S.C.A. § 160(e), authorizing the Labor Board, under the circumstances stated by the Congress, "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of" that Act. No such power is conferred on the courts by Section 17 of the Fair Labor Standards Act.

By the Fair Labor Standards Amendments of 1949, 63 Stat. 910, 920, Section 17 was amended by adding the proviso,

21 "That no court shall have jurisdiction, in any action brought by the Administrator [Secretary of Labor] to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action."

For the Secretary the inference is drawn that this amendment recognizes the power of district courts to order restitution in an injunction decree ordering reinstatement of wrongfully discharged employees. For the jewelry company employer it is said that the amendment negatives any such inference and, on the contrary, shows a Congres-

sional recognition of the non-existence of such power as is claimed by the Secretary for the courts. The Conference

Committee, in its report, discussed the purposes and effect of the amendment to Section 17.³ In the drafting of the 1949 Act there was included as Section 16(e) the provision that, with the exceptions stated, the Administrator, now the Secretary, could sue with the consent of the employees for unpaid minimum wages and unpaid overtime compensation. Thus was created a cause of action in the Secretary. Suits by him under the statute are in effect, suits by the United States. *Walling v. Norfolk Southern Ry. Co.*, 4th Cir. 1947, 162 F. 2d 95, *Walling v. Frank Adam Electric Co.*, 8th Cir. 1947, 163 F. 2d 277;

³"The House bill adopted the language of section 17 of the act without change. The Senate amendment altered this section to include a more precise description of the United States courts having jurisdiction of actions to restrain violations. The legal effect of both versions was the same. The conference agreement adopts the Senate version with a proviso to the effect that no court shall have jurisdiction, in any action brought by the Administrator to restrain violations of section 15, to order payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages. This proviso has been inserted in Section 17 of the act in view of the provision of the conference agreement contained in section 16(e) of the act which authorizes the Administrator in certain cases to bring suits for damages for unpaid minimum wages and overtime compensation owing to employees at the written request of such employees. Under the conference agreement the proviso does not preclude the Administrator from joining in a single complaint causes of action arising under section 16(e) and section 17. Nor is it intended that if the Administrator brings an action under section 16(e) he is thereby precluded from bringing an action under section 17 to restrain violations of the act. Similarly, the bringing of an injunction action under section 17 will not preclude the Administrator from also bringing in an appropriate case an action under section 16(e), to collect unpaid minimum wages or overtime compensation owing to employees under the provisions of the law. Nor is the provision intended in any way to affect the court's authority in contempt proceedings for enforcement of injunctions issued under section 17 for violations occurring subsequent to the issuance of such injunctions. The provision, however, will have the effect of reversing such decisions as *McCleomb v. Scerbo* ((C.C.A. 2) 17 Labor Cases No. 65, 297), in which the court included a restitution order in an injunction decree granted under section 17." U.S. Code Congressional Service, 1949, p. 2273.

12

Mitchell v. Floyd Pappin & Son, D. C. Mont. 1954, 122 F. Supp. 755. Section 17 denies to the courts any power to order payment of minimum wages and overtime to employees in the Secretary's suit to enjoin violations of Section 15. The Congress could have given but did not give to the Secretary and cause of action to sue for restitution on behalf of wrongfully discharged employees. Are we to assume, absent any expression in congressional enactment or legislative history, that Congress intended by implication to give the Secretary acting on behalf of the United States, such a cause of action? We think not.

The Secretary has expressed a doubt that a wrongfully discharged employee has a cause of action, enforceable in a Federal Court, to recover for losses resulting from a wrongful discharge. The Second Circuit Court of Appeals has held, in a case arising before the 1949 amendment, that the employee had no right which he could assert in a Federal forum.⁴ We do not feel any necessity for deciding whether or not the employee has a cause of action. If he has, then without congressional authority the Federal Courts cannot, at the suit of the Secretary, enforce his cause of action. The employee would be the real party in interest. Cf. Rule 17(a) Fed. Rules Civ. Proc., 28 U.S.C.A. If the Secretary is seeking to enforce, on behalf of the United States or in his own right as Secretary, a cause of action vested in him, we must look for a congressional enactment which creates the cause of action. The right of the Secretary to seek and the power of the court to grant the relief which was denied by the district court must be expressly conferred by an act of Congress or be necessarily implied from a congressional enactment.

The effect of the amendment to Section 17 was the subject of an interesting comment *co*n*m*ent*** in an opinion of the Ninth Circuit Court of Appeals where it was said:*

⁴"The dismissal of the second count was also necessary and proper since the Fair Labor Standards Act, *supra*, confers no jurisdiction upon the court over a civil action to recover damages for the discharge of an employee in violation of the statute. Such action must be redressed, if at all, by criminal proceedings in conformity with § 15(a)(3) of the Act." *Bonner v. Elizabeth Arden, Inc.*, 2nd Cir. 1949, 177 F. 2d 703.

“An attempt by the Administrator of the Wage and Hour Division to assert the power of collecting restitution was supported by various courts improvidently. [Citing *McComb v. Scerbo* and *Walling v. O’Grady*]. The Congress rebuked this attempt and in effect repealed the supporting decisions by amending the basic act expressly to forbid collection of restitution by the agency.” *United States v. Parkinson*, 9th Cir. 1956, 240 F. 2d 918.

The report of the Conference Committee, *supra*, stated that the amendment to Section 17 was not intended “to affect the court’s authority in contempt proceedings for enforcement of injunctions issued under section 17 for violations occurring subsequent to the issuance of such injunctions.” (Emphasis supplied.) This suggests that there was no power to grant restitution for violations occurring prior to the issuance of an injunction. It was the apparent intent of Congress, in passing the 1949 amendment to Section 17, that it “will have the effect of reversing such decisions as *McComb v. Scerbo* * * * in which the court included a restitution order in an injunction decree granted under section 17.” The O’Grady case is not “such a case” as the Scerbo case in that Scerbo deals with overtime wages while O’Grady involved loss of wages due to a wrongful discharge. But the reasons for the decision in Scerbo are those announced in O’Grady, and the authority of O’Grady was, we think, the primary precedent relied upon in Scerbo. To that extent O’Grady was one, and perhaps the only one from an appellate court, of “such decisions as *McComb v. Scerbo*.” The O’Grady case was one “in which the court included a restitution order in an injunction decree granted under section 17,” and in that respect the O’Grady case was one “of such decisions as *McComb v. Scerbo*”. But 25 the proviso added to Section 17 by the 1949 amendment dealt solely with the minimum wage and overtime compensation provisions. Without expressly holding, therefore, because we find it unnecessary to do so, that the Congress intended, by the amendment, to expressly repudiate the doctrine of the O’Grady case although the report of the Committee points strongly in

that direction, we have no hesitancy in saying that the reliance in the O'Grady case on the cases cited by it was misplaced and that we do not regard that decision as authoritative.

If the district courts have the authority to direct restitution to employees who have been wrongfully discharged in connection with an injunction directing reinstatement, such authority exists, we think, as an equitable power granted by implication as necessarily being an incident of ancillary to the judicial power expressly conferred by the congressional act. The Secretary places reliance upon *Porter v. Warner Co.*, 328 U. S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332. There the Administrator under the Emergency Price Control Act, 56 Stat. 23, brought a suit to enjoin the collection of rents in excess of the permitted maximum, and to require the defendant property owner to tender to his tenants the excess rents he had collected. The Act gave tenants a cause of action for treble damages. The courts were authorized, upon application of the Administrator to grant "a permanent or temporary injunction, restraining order, or other order." The Supreme Court found that district courts could enter orders directing restitution. It quoted from a Senate

Committee report a statement that the "courts are
26 given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case." This, said the Supreme Court, "is an unmistakable acknowledgment that courts of equity are free to act under § 205(a)⁵ in such way as to be most responsive to the statutory policy of preventing inflation", 328 U. S. 401. Thus it appears that by authorizing the entry of an "other order", a broad general power to grant equitable relief was conferred by Congress. The

⁵ "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provisions of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction restraining order, or other order shall be granted without bond." 56 Stat. 23, 33.

general equitable power, said the Supreme Court, is not to be denied unless the statute expressly or by a necessary inference restricts the court's jurisdiction in equity. Of the Price Control Act, and the Porter decision construing it, the Ninth Circuit Court of Appeals has observed:

"The courts construed certain language of the Price Control Act to compel mandatory restitution. But this legislation was passed and interpreted in time of a struggle for national existence. These laws are now in abeyance and they constitute a doubtful precedent for the extension of enactments such as this which are intended to represent permanent policy in peaceful times as well." *United States v. Parkinson, supra.*

27 The excess rentals collected were moneys received by the landlord in violation of the express provisions of a statute or a Regulation issued pursuant to it. The situation is not unlike that of the employer in a contempt case who, in violation of a court order, prospective in its effect when entered, retains funds which belong to his employees. Here the right of recovery, if any right there be, is that of the wrongfully discharged employee to recover damages for the wrong done to him. No right to recover damages in such a case has been given to him or to the Secretary for him by the statute, nor does the statute contain language which indicates a recognition of any such right. There is, as has been indicated, a judicial determination denying the existence of any such right in the employee. We are unable to find or infer any intent of the Congress that the courts should have power, as an incident to an order directing reinstatement of discharged employees, to direct the payment of the damages resulting from the loss of wages. The meagre indications of congressional purposes which we are able to glean from the Act and from the Committee Report indicate a contrary intent. In any event, we conclude that the doctrine stated in the O'Grady case, for which the Secretary here contends, is not expressive of the present state of the law.

The district court refrained from deciding whether it was authorized to require restitution of wages lost by the discharged employees "inasmuch as in the exercise of the court's discretion such reimbursement would not be

ordered even assuming, without deciding, that the court
would have jurisdiction to order such reimbursement".
28 If we had decided that the court was au-
thorized to grant the relief of awarding the loss of
wages damage to the employees it would have been neces-
sary to review more of the record than is before us in
order to determine whether or not there was an abuse of
discretion in denying the relief sought. This question is
not reached.

The appellee, subsequent to the argument of this appeal has suggested that the district court was without power to issue an injunction directing the reinstatement of the employees who were wrongfully discharged. The suggestion is without merit.

The decree of the district court is

AFFIRMED.

29

IN UNITED STATES COURT OF APPEALS

No. 17068

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor,

versus

ROBERT DEMARIO JEWELRY, Inc., and
ROBERT DEMARIO, an individual.

Judgment—November 7, 1958

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed.

30

Clerk's Certificate to foregoing
transcript omitted in printing

Plaintiff's Exhibit 63

32

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

UNITED STATES OF AMERICA

v.

ROBERT DEMARIO JEWELRY, INC., a Georgia Corporation;
ROBERT DEMARIO; and LARRY BROWN

CRIMINAL INFORMATION

VIO: Title 29, Secs. 215(a)(1), 215(a)(2) and 215(a)(5)

OFFENSES:

1. Failure to pay minimum wage
(Section 215(a)(2))
(Count I)
2. Failure to pay overtime compensation
(Section 215(a)(2))
(Count II)
3. Falsification of Records
(Section 215(a)(5))
(Count III)
4. Failure to keep records
(Section 211(c))
(Count IV)
5. Shipment of goods
(Section 215(a)(1))
(Count V)

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

No. 4482
(29 U.S.C. 201, et seq.)

UNITED STATES OF AMERICA

v.

ROBERT DEMARIO JEWELRY, Inc., a Georgia Corporation;
ROBERT DEMARIO; and LARRY BROWN

THE UNITED STATES ATTORNEY CHARGES:

COUNT I

(U.S.C., Title 29, Secs. 215(a)(2) and 216(a))

Defendants, Robert DeMario Jewelry, Inc., a Georgia corporation, Robert DeMario, and Larry Brown, employers within the meaning of the Fair Labor Standards Act of 1938, as amended, did, within the period beginning March 26, 1954, and ending March 26, 1956, at Ft. Gaines, Georgia, within the Middle District of Georgia and within the jurisdiction of this court, unlawfully and wilfully pay to their employees Mary Aldrich, Jo Bruner, Betty Bryan, Mrs. G. W. Crapps, Wilma Dews, Jeanette Fouché, Nadine Gashaw, Maybelle Giles, Dorothy Ann Hardwick, Carolyn Hartley, Marion King, Fannie Mae Martin, Paralee Pate, and Mrs. Odis Rejko, each of whom was engaged in the production of goods for commerce, wages at rates less than seventy-five (75) cents per hour up to March 1, 1956, and wages at rates less than \$1.00 an hour thereafter, contrary to the Act referred to above (U.S.C., Title 29, Secs. 206 and 215(a)(2)).

COUNT II

(U.S.C., Title 29, Secs. 215(a)(2) and 216(a))

Defendants, Robert DeMario Jewelry, Inc., a Georgia Corporation, Robert DeMario, and Larry Brown, employers within the meaning of the Fair Labor Standards Act of 1938, as amended, did, within the period beginning March 26, 1954 and ending March 26, 1956, at Ft. Gaines,

Georgia, within the Middle District of Georgia and within the jurisdiction of this court, unlawfully and wilfully employ Jo Bruner, Betty Bryan, Mrs. G. W. Crapps, Wilma

Dews, Nadine Gashaw, Carolyn Hartley and Fannie
34 Mae Martin, in the production of goods for commerce for workweeks longer than forty hours without paying such employees compensation for the hours in excess of forty at a rate not less than one and one-half times the regular rate at which such employees were employed, contrary to the Act referred to above (U.S.C., Title 29, Secs. 207 and 215(a)(2)).

COUNT III

(U.S.C., Title 29, Secs. 215(a)(5) and 216(a))

Defendants, Robert DeMario Jewelry, Inc., a Georgia Corporation, Robert DeMario, and Larry Brown, employers within the meaning of the Fair Labor Standards Act of 1938, did, within the period beginning March 26, 1954 and ending March 26, 1956, at Ft. Gaines, Georgia, within the Middle District of Georgia and within the jurisdiction of this court, unlawfully and wilfully make, and cause to be made, records showing the hours purported to have been worked during many workweeks by their employees Mary Aldrich, Jo Bruner, Betty Bryan, Mrs. G. W. Crapps, Wilma Dews, Jeanette Fouche, Nadine Gashaw, Maybelle Giles, Dorothy Ann Hardwick, Carolyn Hartley, Marion King, Fannie Mae Martin, Paralee Pate, and Mrs. Odis Rejko, who were, in such workweeks, employed by the defendants in the production of goods for commerce and subject to the provisions of Sections 6 and 7 of the Fair Labor Standards Act of 1938, as amended, (U.S.C., Title 29, Secs. 206 and 207), which records were required to be kept by Section 11(c) of said Act (U.S.C., Title 29, Sec. 211(c)) and the Regulations duly promulgated thereunder (Code of Federal Regulations, Title 29, Chapter V, Part 516), knowing such records to be false in a material respect in that said records set forth a lesser number of hours than those actually worked by such employees, during said workweeks, contrary to the Act referred to above (U.S.C., Title 29, Sec. 215(a)(5)).

COUNT IV

(U.S.C., Title 29, Secs. 215(a)(5) and 216(a))

Within the period beginning March 26, 1954 and ending March 26, 1956, defendants Robert DeMario Jewelry, Inc., a Georgia Corporation, Robert DeMario and Larry Brown, employers within the meaning of the Fair Labor Standards Act of 1938, as amended, did, at Ft. Gaines, Georgia, within the Middle District of Georgia and within the jurisdiction of this court wilfully and unlawfully fail to make,

keep and preserve a record showing the hours
35 worked each workday and each workweek by their
employees, including homeworkers, who were en-
gaged in the production of goods for commerce, and who
were, during the said period, subject to Sections 6 and 7
of the Fair Labor Standards Act of 1938, as amended,
(U.S.C., Title 29, Secs. 206 and 207), which record is re-
quired to be kept pursuant to Section 11(c) of said Act
(U.S.C., Title 29, Sec. 211(c)) and the Regulations duly
promulgated thereunder (Code of Federal Regulations,
Title 29, Chapter V, Part 516), contrary to the Act re-
ferred to above (U.S.C., Title 29, Sec. 215(a)(5)).

COUNT V

(U.S.C., Title 29, Secs. 215(a)(1) and 216(a))

Within the period beginning March 26, 1954, and ending March 26, 1956, in the Middle District of Georgia and within the jurisdiction of this court, defendants Robert DeMario Jewelry, Inc., a Georgia Corporation, Robert DeMario and Larry Brown during many workweeks, unlawfully and wilfully transported, shipped, delivered, and sold in commerce from the State of Georgia to points outside that State goods in the production of which employees were employed in violation of Sections 6 and 7 of the Fair Labor Standards Act of 1938, as amended, (U.S.C., Title 29, Secs. 206 and 207), in that they were employed by defendants in the production of goods for commerce at rates of pay less than seventy-five (75) cents per hour up to March 1, 1956 and at rates of pay less than \$1.00 per hour thereafter, and during each of various workweeks for more than forty hours per workweek without receiv-

ing compensation for their employment for the hours in excess of forty per workweek at a rate not less than one and one-half times the regular rates at which they were employed, contrary to Said Act (U.S.C., Title 29, Sec. 215(a)(1)).

FRANK O. EVANS
United States Attorney

By JOSEPH H. DAVIS
Assistant United States Attorney

36

No. 4482

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA

UNITED STATES OF AMERICA

v.

ROBERT DEMARO JEWELRY, INC., ROBERT DEMARIO
LARRY BROWN

29 USC 215(a)(1), 215(a)(2) and 215(a)(5)

Filed July 24, 1956

JOHN P. COWART, *Clerk.*
By H. OKAY PARKER, *Deputy.*

PLEA

I, ROBERT DEMARIO JEWELRY, INC., having been advised of my Constitutional rights, and having had the charges herein stated to me, plead guilty In Open Court, this 14th day of November, 1956.

STONE & STONE
Attorney for Appellants.

PLEA

I, ROBERT DEMARIO, having been advised of my Constitutional rights, and having had the charges herein stated to me, plead guilty In Open Court, this 14th day of November, 1956.

STONE & STONE
Attorney for Appellants

PLEA

I, LARRY BROWN having been advised of my Constitutional rights, and having had the charges herein stated to me, plead guilty In Open Court, this 14th day of November, 1956.

STONE & STONE
Attorney for Appellants

37 CERTIFIED COPY

D. C. FORM NO. 30

UNITED STATES OF AMERICA }
MIDDLE DISTRICT OF GEORGIA } ss:

I, JOHN P. COWART, Clerk of the United States District Court in and for the Middle District of Georgia, do hereby certify that the annexed and foregoing is a true and full copy of the original

CRIMINAL INFORMATION in the case of:

UNITED STATES OF AMERICA

v.

ROBERT DEMARIO JEWELRY, INC., a Georgia Corporation;
ROBERT DEMARIO; and LARRY BROWN

now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Macon, Georgia this 14th day of November, A. D. 1956

JOHN P. COWART, *Clerk.*

By BETTY M. JONES, *Deputy Clerk.*

(SEAL)

38 DISTRICT COURT OF THE UNITED STATES
 MIDDLE DISTRICT OF GEORGIA

COLUMBUS DIVISION

CRIMINAL No. 4482

VIO: 29 USC 201, et seq.

UNITED STATES OF AMERICA

v.

ROBERT DEMARIE JEWELRY, INC., a Georgia Corporation

SENTENCE

The defendant having pleaded guilty, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, and the Court having adjudged the defendant guilty as charged and convicted,

WHEREUPON IT IS CONSIDERED, ORDERED and ADJUDGED by the Court that the defendant, ROBERT DEMARIE JEWELRY, INC. now present in Court, shall pay a fine to the United States of America in the sum of FORTY-FIVE HUNDRED (\$4500.00) Dollars; said fine to be collected by execution if not paid within 60 days from this date,

In Open Court, this the 14th day of November, 1956.

T. HOYT DAVIS
T. Hoyt Davis,
United States Judge

At Macon, Georgia.

39

DISTRICT COURT OF THE UNITED STATES
MIDDLE DISTRICT OF GEORGIA

COLUMBUS DIVISION

CRIMINAL No. 4482

VIO: 29 USC 201, et seq.

UNITED STATES OF AMERICA

v.

ROBERT DEMARIO

SENTENCE

The defendant having pleaded guilty, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, and the Court having adjudged the defendant guilty as charged and convicted,

WHEREUPON IT IS CONSIDERED, ORDERED and ADJUDGED by the Court that the defendant, ROBERT DEMARIO now present in Court, shall pay a fine to the United States of America in the sum of FOUR HUNDRED (\$400.00) Dollars.

In Open Court, this the 14th day of November, 1956.

T. HOYT DAVIS
T. Hoyt Davis,
United States Judge

At Macon, Georgia.

DISTRICT COURT OF THE UNITED STATES
MIDDLE DISTRICT OF GEORGIA

COLUMBUS DIVISION

CRIMINAL No. 4482

VIO: 29 USC 201, et seq.

UNITED STATES OF AMERICA

v.

LARRY BROWN

SENTENCE

The defendant having pleaded guilty, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, and the Court having adjudged the defendant guilty as charged and convicted,

WHEREUPON IT IS CONSIDERED, ORDERED and ADJUDGED by the Court that the defendant, LARRY BROWN now present in Court, shall pay a fine to the United States of America in the sum of ONE HUNDRED (\$100.00) Dollars.

In Open Court, this the 14th day of November, 1956.

T. HOYT DAVIS
T. Hoyt Davis,
United States Judge

At Macon, Georgia.

41

SUPREME COURT OF THE UNITED STATES

No.

OCTOBER TERM, 1958

JAMES P. MITCHELL, Secretary of Labor, United States
Department of Labor, *Petitioner,*

v.

ROBERT DEMARIO JEWELRY, INC., and ROBERT DEMARIO

**Order Extending Time to File Petition for
Writ of Certiorari—January 23, 1959**

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

March 6th, 1959.

Hugo L.~~HUGO L.~~ T. BLACK

*Associate Justice of the Supreme
Court of the United States.*

Dated this 23d
day of January, 1959

42

SUPREME COURT OF THE UNITED STATES

No. 746

October Term, 1958

(Title omitted)

Order Allowing Certiorari—April 20, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. _____

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, PETITIONER

v.

ROBERT DEMARIO JEWELRY, INC., ET AL.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on November 7, 1958.

OPINIONS BELOW

The Findings, Conclusions and Decree of the District Court (R. 6-12)¹ are not officially reported (13 WH Cases 709). The opinion of the Court of Appeals (App. A, *infra*, pp. 15-26) is reported at 260 F. 2d 929.

¹ "R." references are to the transcript of record as printed for the use of the Court of Appeals, copies of which have been filed with the Clerk.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1958 (App. A, *infra*, p. 26). By order of Mr. Justice Black, dated January 23, 1959, the time for filing a petition for a writ of certiorari was extended to and including March 6, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in an action by the Secretary of Labor under Section 17 of the Fair Labor Standards Act, the district courts have power, ancillary to the authority "to restrain * * * violations", to order reimbursement for loss of wages resulting from the discriminatory discharge of employees in violation of the Act.

STATUTES INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*), are set forth in full in Appendix B, *infra*, pp. 27-29. The provisions particularly involved are Sections 15(a)(3) and 17, which read as follows:

SEC. 15. (a) * * * [I]t shall be unlawful for any person—

* * * * *

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has

served or is about to serve on an industry committee; * * *.

* * *

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin the respondents from discriminating against their employees in violation of Section 15(a)(3) of the Act, and to require them to reinstate three employees discharged in violation of that section, and to reimburse them for wages lost as a result of the wrongful discharges.

On November 14, 1956, respondents were convicted, upon a plea of guilty in a criminal action, of having violated the Fair Labor Standards Act by underpaying their employees and failing to keep proper records (M.D. Ga. Criminal No. 4482). Two days later, they learned that the three employees involved in this case had requested the Department of Labor to bring suit for the amount of the underpayments

(Fdg. 3; R. 7). Respondent DeMario, "disturbed, excited and displeased with the three employees * * * because of their having authorized the bringing of * * * suit", protested to each of them in individual interviews held the same day (Fdg. 4; R. 8). "Because of the [respondents'] displeasure over the filing of * * * suit," they "immediately" entered upon a course of discrimination against the complaining employees, and two weeks later terminated their employment with the company (Fdgs. 6-10; R. 8-9).

The District Court found that "[t]he three named employees would not have been laid off if it had not been for the filing of said suits, or if they had been laid off they would have been reinstated long since" (Fdg. 10; R. 9).² It concluded that the respondents had thereby violated Section 15(a)(3) of the Act, which forbids discrimination against employees for resorting to the Act's procedures (Concl. 3, R. 10).

On these findings, the trial court issued a decree enjoining the respondents from violating Section 15(a)(3), and requiring them to offer reinstatement to the three employees. It declined, however, to order the respondents to reimburse the three employees for wages lost by them as a result of the respondents' unlawful conduct (Concl. 5; R. 10-11).

The Court of Appeals, in affirming the judgment, sustained the trial court's authority to issue the rein-

² At the trial, Mrs. Duke, one of the three employees, testified that she had been unemployed at all times since the discharge some ten months before, although she had actively sought employment and was at all times ready and able to work (Tr. 34-35, 297).

statement order as relief ancillary to the injunction expressly authorized by Section 17. It held, however, that the trial court had no corresponding authority to issue a reimbursement order "absent any expression in Congressional enactment or legislative history" (App. A, *infra*, p. 20).

In sustaining the denial of the reimbursement order, the Court of Appeals noted the enactment in 1949 of the proviso in Section 17 expressly denying jurisdiction to issue specified types of orders for the payment of restitution to employees (App. A, *infra*, p. 20).³ However, the court recognized that the proviso, in terms, deals solely with amounts owed on account of underpayments (App. A, *infra*, p. 23), and expressly disclaimed reliance on the proviso as a ground of decision. The court rested its decision upon its view that, even before the proviso was adopted, there was no jurisdiction to grant reimbursement orders for losses resulting from discriminatory discharges. (App. A, *infra*, p. 25).

REASONS FOR GRANTING THE WRIT

In holding that this type of reimbursement order is not available in equity proceedings under Section 17, the decision below is in direct conflict, as the Court of Appeals recognized, with the ruling of the Court of

³ Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 920. The proviso reads: "*Provided*, That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action."

Appeals for the Second Circuit in *Walling v. O'Grady*, 146 F. 2d 422.⁴ It is also incompatible with the principle, underlying a number of decisions of this Court, that in the exercise of jurisdiction granted by a statute to restrain violation of its provisions "all the inherent equitable powers of the District Court are available" unless there is explicit legislative command to the contrary (*Porter v. Warner Co.*, 328 U.S. 395, 397-398).

The issue presented is of major importance in the administration of the Fair Labor Standards Act, since effective enforcement of the wage-and-hour provisions is virtually dependent on the freedom of employees to participate as complainants and witnesses without fear of economic loss at the hands of their employer. In view of the intimidatory pressures inherent in the employment relationship, of which this Court has on several occasions taken note (see *infra*, pp 13-14), Congress has explicitly forbidden the employer to discriminate against employees for filing complaints or giving testimony under the Act. Section 15(a)(3), *supra*, pp. 2-3. The decision below, if permitted to stand, would vitiate the force of this provision by withdrawing from potential complainants and witnesses the assurance that financial damage resulting from employer retaliation could be undone by process of law. The decision below would thus subject the enforcement of the Act to the powerful obstructive influence which Section 15(a)(3) was intended to eliminate:

⁴ A reimbursement order for losses due to discriminatory discharge was recently issued in *Mitchell v. Equitable Beneficial Co.*, D. N.J., January 17, 1958, 13 WH Cases 564, not officially reported.

1. The proposition laid down by the court below that there is no power to issue reimbursement orders in equity proceedings under Section 17 was squarely presented to the Court of Appeals for the Second Circuit in *Walling v. O'Grady*, 146 F. 2d 422, and was there rejected. Contrary to the express premise of the decision below that "absent any expression in congressional enactment or legislative history" there was no power to issue reimbursement orders, the Second Circuit ruled that a "statutory mandate spelling out all the details of relief necessary for the purpose in hand" was not required; and that authority to order reimbursement for wages lost through discriminatory discharge was within the equity jurisdiction conferred by Section 17 as "a necessary power adequately to carry out the prohibition of the Fair Labor Standards Act." Such reimbursement, it held, was as necessary "to restore the status quo interfered with by the unlawful conduct of the employer" as it was in *Texas & N.O. R. Co. v. Brotherhood of Railway Clerks*, 281 U.S. 548, affirming 33 F. 2d 13 (C.A. 5), in which an order for reinstatement with back wages had been sustained under a statute that contained no provision therefor (the Railway Labor Act of May 20, 1926, c. 347, 44 Stat. 577). The Second Circuit further cited, as analogous, the decision of this Court in *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, where an order was sustained requiring an employer to reimburse rejected applicants for wages lost as a result of discriminatory rejection, although the statute's provision for reim-

busement referred only to the reimbursement of discharged *employees* for wages lost as a result of discriminatory discharge (National Labor Relations Act, par. 10(c), c. 372, 49 Stat. 454).

2. Although the *O'Grady* case was decided before the 1949 Amendments to the Fair Labor Standards Act, the decision below explicitly refrains from reliance upon respondents' contention that the requested order is barred by the proviso added to Section 17 by the Amendments (App. A, *infra*, p. 23). It recognizes that "the 1949 amendment dealt solely with the minimum wage and overtime compensation provisions," and grounds its conclusion on the premise that, contrary to *O'Grady*, there had never been power to order reimbursement. The court appears, nevertheless, to have been influenced by the proviso, since it expresses the view that Congress intended by the proviso "to repudiate the doctrine of the *O'Grady* case" (App. A, *infra*, p. 23). This view of the Congressional purpose in enacting the proviso is, we submit, manifestly erroneous.

The proviso (*supra*, p. 3) was enacted shortly after the decision in *McComb v. Scerbo & Sons*, 177 F. 2d 137 (C.A. 2), in which an order was issued requiring the employer to make reimbursement for unpaid minimum wages and overtime compensation. There had been several previous cases in which orders for the reimbursement of such deficiencies were issued.⁵ The

⁵ *Fleming v. Alderman*, 51 F. Supp. 800 (D. Conn.); *Walling v. Miller*, 138 F. 2d 629 (C.A. 8), the majority opinion sustaining the order on the ground that the employer had waived any objection he might have below, the concurring opinion upholding the order on the same reasoning as *Scerbo*; *Fleming v. Warshawsky*

report of the Conference Committee on the 1949 Amendments referred to these decisions in explaining that the proviso would have the effect of reversing "such decisions as *McComb v. Scerbo*."⁶ The report makes no mention of the *O'Grady* decision in which reimbursement was ordered for losses resulting from an unlawful discriminatory discharge. Consistently, the proviso is precisely formulated to cover the *Scerbo* type of case, referring only to damages for "unpaid minimum wages or unpaid overtime compensation," and containing no language susceptible to interpretation as covering damages for unlawful discharge. That the language was designed only for the restricted purpose specifically articulated is confirmed by the conferees' explanation that the proviso had been inserted in conference "in view of" the simultaneous insertion of a new Section 16(c) (App. B, *infra* pp. 28-29) authorizing the Secretary of Labor to bring suit upon request by employees to recover "unpaid minimum wages or unpaid overtime compensation under section 6 and section 7 of this Act". Section 16(c) provided no such substitute remedy for damages for discriminatory discharge under Section 15(a)(3).⁷

⁶ *Co.,* 123 F. 2d 622 (C.A.7), enforcing a consent decree containing such an order. This Court reserved the question in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193.

⁷ Statement of the Managers on the part of the House, Rept. No. 1453 on H.R. 5856, 81st Cong., 1st Sess., p. 32. See also Report of the Majority of the Senate Conferees, 95 Cong. Rec. 14879.

⁸ Even the provision in Section 16(b) for direct suits by the employee, which antedates the proviso in Section 17, is in terms limited to suits for unpaid minimum wages and overtime compensation. *Bonner v. Elizabeth Arden, Inc.*, 177 F. 2d 703, 705

It is evident from this legislative history that the new proviso in Section 17 and the new Section 16(e) were intended to balance each other, and that recourse to equity was being withdrawn to the extent that recourse to law was being provided. The legislative history thus confirms the unambiguous language of the proviso and shows it to be inapplicable to discrimination cases, where there is no counterpart legal remedy.

3. In rejecting *O'Grady* as wrongly decided, the decision below proceeds on the explicit premise that power to order reimbursement in a proceeding to restrain violations of the Act "must be expressly conferred by an act of Congress or be necessarily implied from a congressional enactment" (App. A, *infra*, p. 22). In so ruling, it runs directly counter to the established principle underlying numerous decisions of this Court that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied" (*Porter v. Warner Co.*, 328 U.S. 395, 398).

In accordance with this principle, a variety of mandatory corrective orders have been held to be within the power of the courts as relief ancillary to injunction, although not supported by affirmative statutory authorization. The *Porter* case established the power to require reimbursement of amounts charged as rent in excess of the maxima established under the Emer-

(C.A. 2); *Powell v. Washington Post Co.*, D.D.C., October 1, 1958, 13 WH Cases 852, not officially reported.

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gency Price Control Act of 1942.⁸ The power to direct reinstatement, with back pay, of employees discharged in violation of the Railway Labor Act was sustained in *Texas & N. O. R. Co. v. Brotherhood of Ry. Clerks*, 281 U.S. 548, affirming 33 F. 2d 13 (C.A. 5), see *supra*, p. 7. In *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, a decree was upheld requiring compliance with an order of the National Labor Relations Board directing an employer to hire, with back pay, applicants rejected in violation of the National Labor Relations Act (see *supra*, p. 7).⁹ And orders

⁸ 56 Stat. 23, 50 U.S.C. App. (1946 ed.) 925(a). The decision below seeks to distinguish *Porter* on the ground that the express authorization of an "injunction [or] restraining order" in Section 205(a) of the Price Control Act is followed by the words "or other order." In doing so, the decision ignores the explicit reasoning in *Porter* that since "the Administrator [had] invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance," and since "[s]uch a jurisdiction is an equitable one," it followed that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction" (328 U.S. at 397-398). Compare the decisions of the Courts of Appeals for the Ninth and Third Circuits, which recognized *Porter* as holding that the restitution order therein was sufficiently grounded as "an equitable adjunct to an injunction," the Ninth Circuit adding "i.e. under the inherent equity powers of the court." *Woods v. McCord*, 175 F. 2d 919, 921 (C.A. 9); *McCoy v. Woods*, 177 F. 2d 354, 355 (C.A. 4).

The court below also relied (App. A, *infra*, p. 25) on *United States v. Parkinson*, 240 F. 2d 918 (C.A. 9), for the proposition that *Porter* was obsolete since it dealt with a wartime measure. But *Porter* plainly cannot be so limited.

⁹ To the objection in *Phelps Dodge* that, while the statute expressly authorized back pay for employees unlawfully discharged, it said nothing about back pay for applicants unlawfully rejected, the Court replied: "Even without such a mandate

have repeatedly been upheld under the Sherman Anti-Trust Act requiring divestiture and similar affirmative corrective measures. *International Boxing Club v. United States*, No. 18, this Term, decided January 12, 1959, slip opinion, pp. 10-20; *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 126-130; *United States v. Paramount Pictures*, *id.* 131, 170-174; *United States v. Griffith*, *id.* 100; *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189-190; *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 78. Although the express authorization in the Sherman Act is merely "to prevent and restrain violations" (Section 4, 26 Stat. 209; 15 U.S.C. 4), the Court has held that the function of the district court "does not end with enjoining continuance of the unlawful restraints nor with dissolving the combination which launched the conspiracy [but] includes undoing what the conspiracy achieved"; for "[o]therwise, there would be reward from the conspiracy through retention of its fruits." *United States v. Paramount Pictures*, 334 U.S. at 171.

The rationale of these cases is clearly applicable to the Fair Labor Standards Act. To limit the court's function in equity proceedings under that Act to the issuance of an injunction against discrimination and a reinstatement order would permit the employer to retain the fruits of his unlawful conduct no less than in the anti-trust cases. For the return of the em-

from Congress [expressly authorizing affirmative relief] this Court compelled reinstatement to enforce the legislative policy against discrimination represented by the Railway Labor Act [*Railway Clerks* case]" (313 U.S. at 188).

ployee to the plant, without remedy for the out-of-pocket loss unlawfully imposed upon him by the employer, would be a clear demonstration to all employees that resort to the procedures of the Act was prohibitively costly. The decisions of this Court leave no doubt that, in proceedings in which "the public interest is involved," the bounds of equitable relief "assume an even broader and more flexible character than when only a private controversy is at stake." *Porter v. Warner Co.*, 328 U.S. 395, 398; *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 552.

4. The issue is, we submit, one of great importance. The provisions of the Fair Labor Standards Act regulate week-to-week wage transactions between a vast number of business establishments and many millions of individual employees. It is obviously not feasible, and would certainly not be consistent with our national traditions, for compliance with the requirements of the Act to be policed by continuous governmental inspection of all payrolls. Enforcement must therefore depend mainly on the filing of complaints and the submission of information by employees who believe they have been denied their rights under the Act. This pattern of enforcement is workable only if the aggrieved employee feels free to approach the enforcement authorities with his complaint.

The Court has on several occasions noted that the economic dependence of employees on continued employment severely inhibits individual protest against substandard labor conditions. See *Holden v. Hardy*, 169 U.S. 366, 397; *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 394; and *Brooklyn Bank v. O'Neil*, 324

U.S. 697, 706-708. To remove this inherent and powerful deterrent against cooperation with the enforcement authorities, Section 15(a)(3), *supra*, pp. 2-3, specifically declares it illegal to discriminate against an employee for asserting his rights under the Act. The decision below, however, blunts the point of this provision by declaring that a complaining employee who has been discharged in retaliation may be entitled, at the most, to start work again after a period of unemployment of unpredictable duration without relief for the out-of-pocket loss he has sustained. With assurance so limited, it may be expected that only the most courageous or perhaps only the foolhardy will be willing in the future to protest against violations of the Act. The decision below thus imposes a considerable burden upon the administration of the Act.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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MARCH 1959.

APPENDIXES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 17068

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor, Appellant and Cross-Appellee

versus

ROBERT DEMARIO JEWELRY, INC. and ROBERT DEMARIO, an Individual, Appellees and Cross-Appellants

(AND REVERSE TITLE)

Appeal and Cross-Appeal from the United States District Court for the Middle District of Georgia

(November 7, 1958)

Before HUTCHESON, *Chief Judge*, and TUTTLE and JONES, *Circuit Judges*.

JONES, *Circuit Judge*: The Secretary of Labor brought suit in the United States District Court for the Middle District of Georgia, invoking the jurisdiction conferred by Section 17 of the Fair Labor Standards Act,¹ against Robert DeMario Jewelry,

¹ "The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have jurisdiction, for cause shown, to restrain violations of section 15; *Provided*, that no court shall

Inc., a corporation, and Robert DeMario who controlled the corporation and owned most of its stock. It was charged by the Secretary that three employees of the jewelry company had been wrongfully discharged in violation of Section 15 of the Act² for having complained to the Secretary that they were not receiving minimum wages. In addition to seeking an injunction, in general terms, against violations of Section 15(a)(3) of the Act, the Secretary prayed that the appellees be required to reinstate the three discharged employees and to reimburse them for wages lost as a result of the wrongful discharges.

The district court entered its decree ordering the reinstatement of the three discharged employees. The district judge indicated a doubt as to whether the court had any power to decree reimbursement for lost wages but found it unnecessary to determine this question "inasmuch as in the exercise of the Court's discretion such would not be ordered even assuming, without deciding, that the Court would have jurisdiction to order such reimbursement." The Secretary has appealed and urges that the district

have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action." 29 U.S.C.A. § 217.

²"(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

* * * * *

(3) To discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee; * * *." 49 U.S.C.A.
§ 215.

court erred in refusing to direct the appellees to make reimbursement to the employees for wages lost as a result of their wrongful discharge. The Secretary designated for printing only those portions of the record consisting of the Complaint, the Answer, and the Findings of Fact, Conclusions of Law and Decree. The appellees, saying that the record on appeal is not sufficient to permit a determination of whether there was an abuse of discretion in denying reimbursement, move that the appeal be dismissed.

The printed record is sufficient for our disposition of the case. If the appellees believed that the portion which the appellant designated for printing was inadequate, the rules of this Court provide the method by which other portions of the record may be included. 5th Cir. Rule 23.

Section 17 of the Fair Labor Standards Act, as originally enacted, merely conferred jurisdiction upon the district courts to restrain violations of Section 15 of the Act. The limiting proviso was not then a part of the statute. The Eighth Circuit Court of Appeals sustained a consent decree in a suit by the Wage and Hour Administrator directing payment to employees of the defendant of the difference between wages paid and the amount payable at the prescribed minimum hourly and overtime rates. *Walling v. Miller*, 8th Cir. 1943, 138 F. 2d 629, cert. den. 321 U.S. 784, 64 S. Ct. 781, 88 L. Ed. 1076. Doubt was expressed as to the authority of the administrator to maintain the suit, but it was found unnecessary to decide the question. One of the judges, in an opinion concurring specially, expressed the opinion that the power given to district courts to restrain violations included the power to direct payments of wage deficiencies unlawfully withheld. Thereafter it was held by the Second Circuit Court of

Appeals that in a proceeding brought under Section 17 for the reinstatement of wrongfully discharged employees the court had inherent power to enforce payment of wages lost by the discharge. *Walling v. O'Grady*, 2nd Cir. 1944, 146 F. 2d 422. In support of its decision the court cited and relied upon *Texas & N.O. R. Co. v. Brotherhood of Ry. Clerks*, 281 U.S. 548, 50 S. Ct. 427, 74 L. Ed. 1034; *Phelps Dodge Corporation v. N.L.R.B.*, 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A.L.R. 1217; and the specially concurring opinion in *Walling v. Miller, supra*.

The O'Grady case was followed in the Second Circuit by *McComb v. Frank Scerbo & Sons*, 2nd Cir. 1949, 177 F. 2d 137, in which it was held that the district courts had power, in a suit to restrain violations of the minimum wage and hour provisions of the Act, to order restitution of overtime wages. In the opinion of the court it followed, and it recited in its opinion that it was following, its O'Grady case. It quoted from the special concurrence in *Walling v. Miller, supra*. The authorities relied upon in the O'Grady case were cited and also the intervening decision in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 69 S. Ct. 497, 93 L. Ed. 599. Cf. *Brotherhood of Ry. & S.S. Clerks v. Texas & N.O. R. Co.*, 25 F. 2d 876, affirmed 33 F. 2d 13. The Texas & N.O. R. Co. case and *McComb v. Jacksonville Paper Co.* case involved situations where prior decrees, framed to act prospectively, had not been complied with and contempt proceedings had thereafter been instituted. In the *McComb v. Jacksonville Paper Co.* opinion it was said "We can lay to one side the question whether the Administrator, when suing to restrain violations of the Act, is entitled to a decree of restitution for unpaid wages." It is hornbook law that in a contempt proceedings for the violation of an injunction

the court may ascertain damages for the breach and enter judgment for such damages. 12 Am. Jur. 430-432, Contempt § 62. The power of Federal courts to enforce decrees and punish by contempt for their breach is expressly recognized in Rule 70, Fed. Rules Civ. Proc., 28 U.S.C.A. Cf. *National Drying Machinery Co. v. Ackoff*, 3rd Cir. 1957, 245 F. 2d 192, cert. den. 355 U.S. 832, 78 S. Ct. 47, 2 L. Ed. 2d 44; *Phelps Dodge Corp. v. N.L.R.B.* involved the provision of the National Labor Relations Act, 29 U.S.C.A. § 160(c), authorizing the Labor Board, under the circumstances stated by the Congress, "to take such affirmative action including reinstatement of employees" with or without back pay, as will effectuate the policies of that Act. No such power is conferred on the courts by Section 17 of the Fair Labor Standards Act.

By the Fair Labor Standards Amendments of 1949, 63 Stat. 910, 920, Section 17 was amended by adding the proviso,

That no court shall have jurisdiction, in any action brought by the Administrator [Secretary of Labor] to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

For the Secretary the inference is drawn that this amendment recognizes the power of district courts to order restitution in an injunction decree ordering reinstatement of wrongfully discharged employees. For the jewelry company employer it is said that the amendment negatives any such inference and, on the contrary, shows a Congressional recognition of the non-existence of such power as is claimed by the Secretary for the courts. The Conference Committee, in its report, discussed the purposes and effect of the

amendment to Section 17.³ In the drafting of the 1949 Act there was included as Section 16(c) the provision that, with the exceptions stated, the Administrator, now the Secretary, could sue with the consent of the employees for unpaid minimum wages and unpaid overtime compensation. Thus was created a cause of action in the Secretary. Suits by him under the statute are, in effect, suits by the United States. *Walling v. Norfolk Southern Ry. Co.*, 4th Cir. 1947, 162 F. 2d 95; *Walling v. Frank Adam Electric Co.*, 8th Cir. 1947, 163 F. 2d 277; *Mitchell v. Floyd Pappin & Son*, D.C. Mont. 1954, 122 F. Supp. 755. Section 17 denies to the courts any power to order payment of minimum wages and overtime to employees in the Secretary's suit to enjoin violations of Section 15. The Congress could have given but did not give to the Secretary any cause of action to sue for restitution on behalf of wrongfully discharged employees. Are we to assume, absent any expression in congressional enactment or legislative history, that Congress intended by implication to give the Secretary acting on behalf of the United States, such a cause of action? We think not.

³ "The House bill adopted the language of section 17 of the act without change. The Senate amendment altered this section to include a more precise description of the United States courts having jurisdiction of actions to restrain violations. The legal effect of both versions was the same. The conference agreement adopts the Senate version with a proviso to the effect that no court shall have jurisdiction, in any action brought by the Administrator to restrain violations of section 15, to order payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages. This proviso has been inserted in Section 17 of the act in view of the provision of the conference agreement contained in section 16(c) of the act which authorizes the Administrator in certain cases to bring suits for damages for unpaid minimum wages and overtime compensation owing to employees

The Secretary has expressed a doubt that a wrongfully discharged employee has a cause of action, enforceable in a Federal Court, to recover for losses resulting from a wrongful discharge. The Second Circuit Court of Appeals has held, in a case arising before the 1949 amendment, that the employee had no right which he could assert in a Federal forum.⁴ We do not feel any necessity for deciding whether or not the employee has a cause of action. If he has, then without congressional authority the Federal courts cannot, at the suit of the Secretary, enforce his cause of action. The employee would be the real

at the written request of such employees. Under the conference agreement the proviso does not preclude the Administrator from joining in a single complaint causes of action arising under section 16(c) and section 17. Nor is it intended that if the Administrator brings an action under section 16(c) he is thereby precluded from bringing an action under section 17 to restrain violations of the act. Similarly, the bringing of an injunction action under section 17 will not preclude the Administrator from also bringing in an appropriate case an action under section 16(c) to collect unpaid minimum wages or overtime compensation owing to employees under the provisions of the law. Nor is the provision intended in any way to effect the court's authority in contempt proceedings for enforcement of injunctions issued under section 17 for violations occurring subsequent to the issuance of such injunctions. The provision, however, will have the effect of reversing such decisions as *McComb v. Scerbo* ((C.C.A. 2) 17 Labor Cases No. 65,297), in which the court included a restitution order in an injunction decree granted under section 17." U.S. Code Congressional Service, 1949, p. 2273.

"The dismissal of the second count was also necessary and proper since the Fair Labor Standards Act, *supra*, confers no jurisdiction upon the court over a civil action to recover damages for the discharge of an employee in violation of the statute. Such action must be redressed, if at all, by criminal proceedings in conformity with § 15(a)(3) of the Act." *Bonner v. Elizabeth Arden, Inc.*, 2nd Cir. 1949, 177 F. 2d 703.

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party in interest. Cf. Rule 17(a) Fed. Rules Civ. Proc., 28 U.S.C.A. If the Secretary is seeking to enforce, on behalf of the United States or in his own right as Secretary, a cause of action vested in him, we must look for a congressional enactment which creates the cause of action. The right of the Secretary to seek and the power of the court to grant the relief which was denied by the district court must be expressly conferred by an act of Congress or be necessarily implied from a congressional enactment.

The effect of the amendment to Section 17 was the subject of an interesting comment arguendo in an opinion of the Ninth Circuit Court of Appeals where it was said:

An attempt by the Administrator of the Wage and Hour Division to assert the power of collecting restitution was supported by various courts improvidently. [Citing *McComb v. Scerbo* and *Walling v. O'Grady*.] The Congress rebuked this attempt and in effect repealed the supporting decisions by amending the basic act expressly to forbid collection of restitution by the agency. *United States v. Parkinson*, 9th Cir. 1956, 240 F. 2d 918.

The report of the Conference Committee, *supra*, stated that the amendment to Section 17 was not intended "to affect the court's authority in contempt proceedings for enforcement of injunctions issued under section 17 for violations occurring subsequent to the issuance of such injunctions." (Emphasis supplied.) This suggests that there was no power to grant restitution for violations occurring prior to the issuance of an injunction. It was the apparent intent of Congress in passing the 1949 amendment to Section 17, that it "will have the effect of reversing such decisions as *McComb v. Scerbo* * * * in which the court included a restitution order in an injunction decree."

granted under section 17." The O'Grady case is not "such a case" as the Scerbo case in that Scerbo deals with overtime wages while O'Grady involved loss of wages due to a wrongful discharge. But the reasons for the decision in Scerbo are those announced in O'Grady, and the authority of O'Grady was, we think, the primary precedent relied upon in Scerbo. To that extent O'Grady was one, and perhaps the only one from an appellate court, of "such decisions as *McComb v. Scerbo.*" The O'Grady case was one "in which the court included a restitution order in an injunction decree granted under section 17," and in that respect the O'Grady case was one "of such decisions as *McComb v. Scerbo*". But the proviso added to Section 17 by the 1949 amendment dealt solely with the minimum wage and overtime compensation provisions. Without expressly holding, therefore, because we find it unnecessary to do so, that the Congress intended, by the amendment, to expressly repudiate the doctrine of the O'Grady case although the report of the Committee points strongly in that direction, we have no hesitancy in saying that the reliance in the O'Grady case on the cases cited by it was misplaced and that we do not regard that decision as authoritative.

If the district courts have the authority to direct restitution to employees who have been wrongfully discharged in connection with an injunction directing reinstatement, such authority exists, we think, as an equitable power granted by implication as necessarily being an incident of or ancillary to the judicial power expressly conferred by the congressional act. The Secretary places reliance upon *Porter v. Warner Co.*, 328 U.S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332. There the Administrator under the Emergency Price Control Act, 56 Stat. 23, brought a suit to enjoin the collection of rents in excess of the permitted maxi-

mum, and to require the defendant property owner to tender to his tenants the excess rents he had collected. The Act gave tenants a cause of action for treble damages. The courts were authorized, upon application of the Administrator to grant "a permanent or temporary injunction, restraining order, or other order." The Supreme Court found that district courts could enter orders directing restitution. It quoted from a Senate Committee report a statement that the "courts are given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case." This, said the Supreme Court, "is an unmistakable acknowledgment that courts of equity are free to act under § 205(a)⁵ in such way as to be most responsive to the statutory policy of preventing inflation", 328 U.S. 401. Thus it appears that by authorizing the entry of an "other order", a broad general power to grant equitable relief was conferred by Congress. The general equitable power, said the Supreme Court, is not to be denied unless the statute expressly or by a necessary inference restricts the court's jurisdiction in equity. Of the Price Control Act, and the Porter decision construing it, the Ninth Circuit Court of Appeals has observed:

⁵ "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provisions of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond." 56 Stat. 23, 33.

The courts construed certain language of the Price Control Act to compel mandatory restitution. But this legislation was passed and interpreted in time of a struggle for national existence. These laws are now in abeyance and they constitute a doubtful precedent for the extension of enactments such as this which are intended to represent permanent policy in peaceful times as well." *United States v. Parkinson, supra.*

The excess rentals collected were moneys received by the landlord in violation of the express provisions of a statute or a Regulation issued pursuant to it. The situation is not unlike that of the employer in a contempt case who, in violation of a court order, prospective in its effect when entered, retains funds which belong to his employees. Here the right of recovery, if any right there be, is that of the wrongfully discharged employee to recover damages for the wrong done to him. No right to recover damages in such a case has been given to him or to the Secretary for him by the statute, nor does the statute contain language which indicates a recognition of any such right. There is, as has been indicated, a judicial determination denying the existence of any such right in the employee. We are unable to find or infer any intent of the Congress that the courts should have power, as an incident to an order directing reinstatement of discharged employees, to direct the payment of the damages resulting from the loss of wages. The meager indications of congressional purposes which we are able to glean from the Act and from the Committee Report indicate a contrary intent. In any event, we conclude that the doctrine stated in the O'Grady case, for which the Secretary here contends, is not expressive of the present state of the law.

The district court refrained from deciding whether it was authorized to require restitution of wages lost

by the discharged employees "inasmuch as in the exercise of the court's discretion such reimbursement would not be ordered even assuming, without deciding, that the court would have jurisdiction to order such reimbursement." If we had decided that the court was authorized to grant the relief of awarding the loss of wages damage to the employees it would have been necessary to review more of the record than is before us in order to determine whether or not there was an abuse of discretion in denying the relief sought. This question is not reached.

The appellee, subsequent to the argument of this appeal, has suggested that the district court was without power to issue an injunction directing the reinstatement of the employees who were wrongfully discharged. The suggestion is without merit.

The decree of the district court is

Affirmed.

JUDGMENT

Extract from the Minutes of November 7, 1958.

No. 17068

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

versus

ROBERT DEMARIO JEWELRY, INC., and ROBERT DEMARIO, an individual

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX B

The pertinent provisions of the Fair Labor Standards Act, Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended by the Fair Labor Standards Amendments of 1949 and of 1955, c. 736, 63 Stat. 910; c. 867, 69 Stat. 711, 29 U.S.C. 201 *et seq.*, are as follows:

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—(1) not less than \$1 an hour; * * *.

MAXIMUM HOURS

SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

PROHIBITED ACTS

SEC. 15. (a) * * * [I]t shall be unlawful for any person—

* * * * *

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Secretary issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted

or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee; * * *.

PENALTIES

* * * * *

SEC. 16. (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated * * *.

(c) The Secretary of Labor is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or section 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. When a written request is filed by any employee with the Secretary claiming unpaid minimum wages or unpaid overtime compensation under section 6 or section 7 of this Act, the Secretary may bring an action in any court of competent jurisdiction to recover the amount of such claim: * * * The consent of any employee to the bringing of any such action by the Secretary, unless such action is dismissed without prejudice on motion of the Secretary, shall constitute a waiver by such

employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. * * *

INJUNCTION PROCEEDINGS

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 39

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, PETITIONER

v.

ROBERT DEMARIO JEWELRY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The findings, conclusions and decree of the District Court (R. 7-13) are not officially reported (13 WII Cases 709). The opinion of the Court of Appeals (R. 14-23) is reported at 260 F.2d 929.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1958 (R. 23). By order of Mr. Justice Black, dated January 23, 1959, the time for filing a petition for a writ of certiorari was extended to and

including March 6, 1959. The petition was filed on March 3, 1959, and was granted April 20, 1959 (R. 33). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in an action by the Secretary of Labor under Section 17 of the Fair Labor Standards Act, the district courts have power, ancillary to the authority "to restrain violations," to order reimbursement for loss of wages resulting from the discriminatory discharge of employees in violation of the Act.

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*), are set forth in full in the Appendix, *infra*, pp. 41-43. The provisions particularly involved are Sections 15(a)(3) and 17, which read as follows:

SEC. 15. (a) * * * [I]t shall be unlawful for any person—

* * * *

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

* * * *

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the

United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin the respondents from discriminating against their employees in violation of Section 15(a)(3) of the Act, and to require them to reinstate three employees discharged in violation of that section and to reimburse them for wages lost as a result of their unlawful discharge.

On November 14, 1956, respondents were convicted, upon a plea of guilty in a criminal action, of having violated the Fair Labor Standards Act by underpaying their employees and failing to keep proper records (R. 25-31). Two days later, they learned that the three employees involved in the instant case had requested the Department of Labor to bring suit for the amount of the underpayments (Fdg. 3; R. 8). Respondent DeMario, “[i]mmediately after the service of said suit,” being “disturbed, excited and displeased with the three employees named because of their having authorized the bringing of said suit,” protested to each of them in individual interviews held the same day (Fdg. 4; R. 9). “Because of the [respondents’]

4

displeasure over the filing of * * * suit," they "immediately" entered upon a course of discrimination against the complaining employees (Fdg. 6; R. 9). "This discrimination manifested itself in several ways including the changing of seating arrangements of these employees on the following Monday morning, November 19th, giving them less desirable locations or positions in the plant, changing the particular type of work assigned to them, giving instructions that they were not to leave their seats except to go to the restroom and generally finding fault with their work" (Fdg. 6; R. 9). Following about two weeks of this kind of discrimination, their employment was terminated by respondents (Fdgs. 7-10; R. 9-10).

The trial court found that all three employees "were, relatively speaking, long-term employees of defendants", particularly two of them who had worked "continuously" for respondents longer than most, if not all, of respondents' employees (Fdg. 5; R. 9); that "[n]o complaints had ever been made against the work of any of these three employees" (Fdg. 9; R. 10); and that they "would not have been laid off if it had not been for the filing of said suits, or if they had been laid off they would have been reinstated long since" (Fdg. 10; R. 10). It concluded that the respondents had thereby violated Section 15(a)(3) of the Act, which forbids discrimination against employees for resorting to the Act's procedures (Concl. 3; R. 11).

On these findings, the trial court issued a decree enjoining respondents from violating Section 15(a)(3), and requiring them to offer reinstatement to the three employees. However, although expressly concluding

that the "evidence of discrimination is clear and convincing" (Concl. 4; R. 11), and without finding any mitigating circumstances with respect either to the unlawful discrimination or to the resulting wage losses, it declined, "in the exercise of the Court's discretion," to order the respondents to reimburse the employees for wages lost by them as a result of the respondents' unlawful conduct (Concl. 5; R. 11-12).¹

The Secretary appealed from the denial of reimbursement, and respondents cross-appealed from the judgment of reinstatement. The Court of Appeals affirmed, sustaining the trial court's authority to issue the reinstatement order as relief ancillary to the injunction authorized by Section 17 (R. 23), but holding that the trial court had no corresponding authority to issue a reimbursement order (R. 19). It, therefore, concluded that the question whether denial of such relief, on the facts found, exceeded the bounds of sound discretion "is not reached" (R. 23).

In sustaining the denial of the reimbursement order, the Court of Appeals noted the enactment in 1949 of the proviso in Section 17 expressly denying jurisdiction to issue specified types of orders for the payment of restitution to employees (R. 17).² However, ob-

¹ At the time of the entry of the District Court's decree (October 8, 1957; R. 13), almost a year had elapsed since the discharge of the employees. The undisputed evidence shows that one of the three employees (Elizabeth Duke—the one found by the trial court to have been a particularly "long-term" employee of respondents and an "above the average" worker, Edgs. 5, 9; R. 9, 10) had been unemployed at all times since her discharge, although she had actively sought employment and was at all times ready and able to work (Tr. 34-35, 297).

² Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 920. The proviso reads: "*Provided*, That no court shall have juris-

serving that "the proviso * * * dealt solely with the minimum wage and overtime compensation provisions" (R. 20), the court expressly disclaimed reliance on the proviso as a ground of decision. It rested its ruling upon the basis that, regardless of the proviso, there was no jurisdiction to grant reimbursement orders for losses resulting from discriminatory discharges (R. 21).

SUMMARY OF ARGUMENT

The decision below ignores both the purpose of the specific statutory prohibition of discrimination (Section 15(a)(3), *supra*, p. 2) and the basic policy of the Fair Labor Standards Act, in narrowly reading the jurisdictional language of Section 17—"to restrain violations of section 15[(a)(3)]"—to exclude the power to order reimbursement for wage losses due to unlawful discrimination. In repudiating the Second Circuit's decision in *Walling v. O'Grady*, 146 F.2d 422 (which read Section 17 to include such reimbursement power as "a necessary power adequately to carry out the [Act's] prohibition * * * against a discriminatory discharge," *id.* at 423), the Fifth Circuit relies on reasoning plainly inconsistent with the statutory purpose and policy and contrary to the fundamental principle of statutory construction controlling here.

A

The legislative purpose and "main object" of the Act's prohibition against discriminatory conduct (Sec-

dition, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action."

tion 15(a)(3)) is to effectuate the minimum labor standards prescribed in the Act's substantive provisions, and thereby to achieve the declared policy "to correct and as rapidly as practicable to eliminate" "conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and well-being of workers" (Sec. 2). In recognition of the practical fact that effective enforcement would be virtually dependent upon the willingness and freedom of employees to participate as claimants and witnesses, and aware of the powerful intimidatory economic pressures inherent in the employment relationship (particularly for the low-wage workers with whom this Act is primarily concerned), Congress was not content merely to provide enforcement procedures for violations of the substantive statutory standards themselves. The further prohibition against discriminatory retaliation was established for the purpose of "protecting the exercise by workers of full freedom * * *" to participate in such enforcement procedures without fear of economic loss at the hands of their employers (*cf. Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 182-183)—so that employees would be protected "not merely in the exercise of their * * * [substantive rights], but against the economic consequences of a legitimate assertion of those rights" (*cf. National Labor Relations Board v. Killoren*, 122 F.2d 609, at 612 (C.A. 8), certiorari denied, 314 U.S. 696).

It is commonplace that the prospect of permanent loss of several months' pay may be just as effective as the fear of permanent discharge to deter employees from asserting their statutory rights or cooperating

with the enforcement authorities. Simply to forbid new discriminations in the future and to order reinstatement of unlawfully discharged employees, without redress for the severe damage resulting from loss of wages for a long period of unemployment, falls far short of giving the employees the protection and assurance necessary to meet the problem to which Section 15(a)(3) is addressed. Under the decision below, the lesson, not only to the particular employees discharged, but also to the remaining employees, and ultimately to all employees subject to this Act, is that it can prove very costly for an employee to seek redress through the legal procedures provided by the statute. Without assurance that the economic loss incurred by the employee for claiming his rights will be undone, resort to the procedures of the Act becomes a gamble in which the employee is required to risk irremediable loss of all wages for an unpredictable period of unemployment, in order to gain restitution of partial deficiencies in wages due for past periods of employment. The ruling below thus vitiates the force of Section 15(a)(3) and operates to undermine the administrative and enforcement procedures essential to attainment of the basic statutory policy.

B

1. The premise on which the Fifth Circuit's decision rests—that the reimbursement remedy is unavailable unless "expressly conferred by * * * or * * * necessarily implied from a congressional enactment" (R. 19)—is diametrically opposed to the fundamental general principle that when a court's equity jurisdiction is invoked under a regulatory statute, its inherent equitable powers are available "to give effect to the

policy of Congress" and "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." See *Porter v. Warner Co.*, 328 U.S. 395, 398, 400. The application of this principle does not depend upon congressional authorization of specific types of equitable remedies or use in the statute of special phrases such as "effectuate policies" or "enforce compliance" or "issue necessary orders." In particular, this Court's decisions dealing with labor relations statutes and the anti-trust laws (discussed *infra*) demonstrate beyond doubt, not only that general statutory authority "to restrain violations" suffices to invoke the equitable jurisdiction to order affirmative relief to "neutralize" or "rectify * * * existing wrongful conditions," but also that the reimbursement remedy, no less than reinstatement, is essential to achievement of this Act's prohibition of discriminatory conduct and to effectuation of its basic substantive policy.

2. Decisions dealing with the closely analogous legislative policies and prohibitions of other labor statutes have long and consistently recognized that the reimbursement remedy is as essential as reinstatement to achievement of the purpose of the statutory prohibition of discrimination and "vindication of the [Act's] public policy." See *Phelps Dodge, supra*, 313 U.S. at 197. As the Labor Board cases put it, restoration of wage losses, if not always an essential adjunct to reinstatement, is certainly the traditional appropriate "companion remedy of reinstatement," effectuation of the statutory policy depending upon "the

practical interplay of [the] two remedies" (see *National Labor Relations Board v. Seven-Up Co.*, 344 U.S. 344, 348). This Court's decisions have repeatedly recognized that the Labor Board's experience shows that effectuation of the labor policy which the Board enforces "generally requires" both remedies, because "[o]nly thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination" (*Phelps Dodge, supra*, at 194; *Seven-Up*, at 345; *Republic Steel Corp. v. Labor Board*, 311 U.S. 7, at 10). "Such a restoration of the situation as it would have been had the unfair labor practice not occurred is obviously needed to wipe out the coercive effect of the employer's conduct." See *National Labor Relations Board v. Waumbee Mills*, 114 F.2d 226 at 235 (C.A. 1).

That the courts' power to order reimbursement as ancillary to an injunction does not depend on specific statutory authorization—such as the National Labor Relations Act provides with respect to back-pay—is evident from the Court's decision in *Texas & N.O.R. Co. v. Railway Clerks*, 281 U.S. 548, which sustained reinstatement with a back-pay order, as an appropriate measure "to enforce the legislative policy against discrimination represented by the Railway Labor Act * * *," "[e]ven without * * * a mandate from Congress" (see *Phelps Dodge*, at 188). The absence of explicit authorization of such remedies in the Fair Labor Standards Act merely reflects the fact that enforcement of this Act, like the Railway Labor Act and the Anti-Trust Act, is directly entrusted to the pre-existing system of courts already in possession of traditional equity powers requiring no confirmation—in contrast to an administrative agency or board created

by statute and having only such powers as the legislation specifically confers.

3. The anti-trust decisions demonstrate that the exercise by equity courts of power to issue affirmative orders similar to, and fully as broad in scope as, the Labor Board's orders does not depend upon express statutory authorization to grant such relief or specific direction to "effectuate the legislative policies" of the Act. The jurisdiction conferred by the Anti-Trust Act to "prevent and restrain violations"—language precisely equivalent to that of Section 17 of the Fair Labor Standards Act—has always been construed as including "the duty to enforce the statute" by "the usual powers of a court of equity to adapt its remedies" to the execution of the statutory policy, including "the application of broader and more controlling remedies" than the mere "prohibition of future acts" (*United States v. United States Steel Corp.*, 251 U.S. 417; *United States v. Crescent Amusement Co.*, 323 U.S. 173). Significantly, the standards for determining the scope of affirmative relief authorized in anti-trust decrees have been stated in terms virtually identical to the standards applied in the Labor Board cases, i.e., to "neutralize," "wipe out," or "undo" the continuing effects of past unlawful conduct, and to "redress" wrongs and restore "as near as possible * * * the [prior] status quo" (*Standard Oil Co. v. United States*, 221 U.S. 1; *United States v. American Tobacco Co.*, 221 U.S. 106; *International Boxing Club v. United States*, 358 U.S. 242). Anti-trust decisions have sustained various kinds of affirmative orders, including "quite drastic measures to achieve freedom from the influence of the unlawful restraint" (see *United States v. Bausch*

& Lomb Optical Co., 321 U.S. 707, 726), none of which was within powers "expressly conferred" by the Anti-trust Act, or "necessarily implied" by any specific provisions of that Act, as would be required by the test laid down by the court below.

Nothing in the language, context, or legislative history of the Fair Labor Standards Act supports the ruling below that the general principle applied in these labor relations, anti-trust, and price-control cases is not equally applicable to the jurisdiction granted by this Act to restrain discriminatory conduct prohibited by Section 15(a)(3).

C

In particular, the proviso added to Section 17 by the 1949 amendment, *supra*, p. 3 (withdrawing equitable jurisdiction "to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages") does not, by its terms or legislative intent, restrict the courts' jurisdiction to order reimbursement for wage losses resulting from discriminatory discharge. As the court below itself noted, in expressly disclaiming reliance on the proviso, its terms deal "solely with the minimum wage and overtime compensation provisions" (R. 20). The legislative history shows that the language of the proviso was intentionally limited to the specified types of restitution orders, and contradicts the inference drawn by the court below that the legislative aim was to deprive the courts of all power to order reimbursement of any kind. The only proper inference to be drawn from the language, context, and legislative history of the proviso is that its enactment in such limited specific terms

constituted a confirmation, rather than a repudiation, of the earlier *O'Grady* decision approving reimbursement for loss due to discrimination (*supra*, p. 6).

Unlike "unpaid minimum wages or unpaid overtime compensation" (for recovery of which other remedies are authorized by Sections 16(b) and 16(e)), no relief is available at all under the Fair Labor Standards Act for financial loss resulting from unlawful discharge, if it is not available under Section 17. There is thus special reason for application here of the principle that the courts' "equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command" (*Porter v. Warner, supra*, 328 U.S. at 398), and there is no warrant for straining to draw the unsubstantiated inference that Congress intended (either initially or in 1949) to bar the essential reimbursement remedy for damages resulting from prohibited discriminatory conduct.

ARGUMENT

The Jurisdiction Granted by Section 17 of the Fair Labor Standards Act "to Restrain Violations" Includes the Power to Order Reimbursement for Loss of Wages Resulting from Unlawful Discriminatory Discharge of Employees in Violation of Section 15(a)(3) of the Act

Without consideration of the objectives of the Fair Labor Standards Act's prohibition against discriminatory discharge (Section 15(a)(3), *supra*, p. 2), the decision below narrowly reads the general jurisdictional language of Section 17—the district courts "shall have jurisdiction, for cause shown, to restrain violations of section 15" of the Act—to exclude the power to order reimbursement for loss of wages due to discrimination, thus repudiating the Second Circuit's 15-year-old decision in *Walling v. O'Grady*, 146 F. 2d 422,

which held the reimbursement remedy to be "a necessary power adequately to carry out the prohibition of the Fair Labor Standards Act against a discriminatory discharge" (*id.*, at 423). Although the Fifth Circuit opinion suggests that the enactment of the 1949 proviso to Section 17 (*supra*, p. 3) might be construed as a legislative repudiation of the *O'Grady* decision, the court expressly refrained from so holding (R. 20), and deliberately rested its ruling on the premise that judicial power to order monetary reimbursement has always been lacking under the Fair Labor Standards Act (R. 19). We submit that both the ground on which the court chose to rest its decision and its suggestion with respect to the proviso added to Section 17 by the 1949 amendment are erroneous, and that the *O'Grady* decision was, and still is, the correct and sound view of the jurisdiction granted "to restrain violations" of Section 15(a)(3).

A

The purpose of the specific statutory prohibition against discriminatory conduct, as well as the basic policy of the Fair Labor Standards Act, requires reimbursement for wages lost as a result of a discriminatory discharge

The legislative purpose and "main object" of the Fair Labor Standards Act's prohibition against discriminatory conduct (Section 15(a)(3), *supra*, p. 2) is to effectuate the minimum labor standards prescribed in its substantive provisions, by ensuring the effective enforcement so essential to attainment of the Act's "vital national policy" to establish minimum "economic standards consonant with national

well-being" (cf. *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 182, 186).³ "The prohibition against discrimination in regard to hire must be applied as a means toward the accomplishment of the main object of the legislation" (*id.* at 186). Because of the obvious practical fact that effective enforcement of the statutory minimum labor standards would be virtually dependent upon the willingness and freedom of employees to participate as claimants and witnesses without fear of economic loss at the hands of their employers, Congress was not content merely to provide enforcement procedures for violations of the standards themselves. The further prohibition of discriminatory practices was provided for the purpose of "protecting the exercise by workers of full freedom . . . to participate in such enforcement procedures (cf. *Phelps Dodge, supra*, at 182-183). In evident recognition of the intimidatory economic pressures inherent in the employment relationship, particularly for the low-wage workers with whom this Act is primarily concerned, Congress undertook to protect workers "not merely in the exercise of their * * * [substantive rights], but against the economic consequences of a legitimate assertion of those rights."⁴

³ Cf. "Finding and Declaration of Policy" in Section 2 of Fair Labor Standards Act: "to correct and as rapidly as practicable to eliminate the conditions above referred to," i.e., "conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."

⁴ Cf. *National Labor Relations Board v. Killoren*, 122 F. 2d 609 (C.A. 8), certiorari denied, 314 U.S. 696:

"It is self-evident, we think, that it would materially aid in effectuating the policies of the Act, for the workmen in industry generally to feel assured that they would be protected, as fully as soundly possible, not merely in the exercise of their * * *

The provisions of the Fair Labor Standards Act regulate week-to-week wage transactions between a vast number of business establishments and many millions of individual employees. It is not feasible, and would not be consistent with our national traditions, for compliance with the requirements of the Act to be policed by continuous governmental inspection of all payrolls. Enforcement must therefore depend mainly on the filing of complaints and the submission of information by employees who believe they have been denied their rights under the Act. The Act's pattern of enforcement is workable only if the aggrieved employee feels free to approach the enforcement authorities with his complaint. It is obvious that he is not free if he has cause to fear economic retaliation by the employer. This Court has long recognized that the economic dependence of employees upon their employer works powerfully upon them to accept substandard labor conditions rather than to expose themselves individually to his unfavorable attention. See *Holden v. Hardy*, 169 U.S. 366, 397; *West Coast Hotel v. Parrish*, 300 U.S. 379, 394; and *Brooklyn Bank v. O'Neil*, 324 U.S. 697, 706-708. It is commonplace knowledge that the prospect of permanent loss of several months' pay will cause em-

[substantive rights], but against the economic consequences of a legitimate assertion of those rights. The experience of the Board, as reflected in its decisions, demonstrates the need for this assurance" [122 F. 2d at 612].

* * * * *
"The purpose of a back pay allowance under the National Labor Relations Act * * * is, as has been indicated above, to leave an employee, as nearly as possible, in the same situation that he would have occupied, if there had been no discrimination against him" [id. at 613].

ployees to "hesitate fearlessly to exercise their rights secured to them by the statute," just as effectively as the fear of permanent discharge (see *National Labor Relations Board v. Regal Knitwear Co.*, 140 F. 2d 746, 747 (C.A. 2), affirmed on other grounds, 324 U.S. 9). The recalcitrant employer thus has it in his power, in the absence of effective redress for wage losses caused by his discriminatory conduct, to choke off administrative and judicial enforcement at the outset. It is to this problem that Section 15(a)(3) addresses itself by expressly declaring such retaliation to be illegal:

The case at bar presents a clear instance of the need for full redress to employees of economic loss resulting from violations of Section 15(a)(3). Three employees who presumed to test their rights in proceedings authorized by law were promptly subjected to gross and open discrimination in the plant, and were shortly thereafter dismissed from employment (see the Statement, *supra*, pp. 3-4). The lesson not only to the particular employees discharged, but also to the remaining employees, was clear and explicit:—the employer would know how to deal with employees who appealed to law. Absent correction, it may be assumed that it would thereafter be a rare employee of respondents who would lay claim to his rights under the Act. By way of remedy, the court below directed future desistance from discrimination and reinstatement of the three employees to the payroll, but they were afforded no redress for the severe and continuing penalty already imposed on them in the form of a long period of unemployment. Under the decree as issued, they may return to work, but only in the chastening knowledge that it may be very costly for an employee

to seek redress through the legal procedures provided by the statute.

To accomplish the purpose of the Act, it is essential that the employee have assurance that, if he is injured by his employer for claiming his rights under the Act, the economic loss will be undone by process of law. "The experience of the [Labor] Board, as reflected in its decisions, demonstrates the need for this assurance" (see *National Labor Relations Board v. Killoren*, *supra*, pp. 15-16, fn. 4; and discussion of the labor relations decisions, *infra*, p. 22 *et seq.*).

If this assurance is denied, as by the decision below, then resort to the procedures of the Act becomes a gamble in which the employee is required to risk irreparable loss of full wages for an unpredictable period of unemployment, in order to gain restitution of partial deficiencies in wages due for periods in the past. Thus the effect of the decision below, if permitted to stand, would be not only to deny meaningful redress to the victimized employees, but also to advise all the employees in the respondents' plant, and in the community, and ultimately all the employees subject to the Act, that the guarantee against discrimination proclaimed by Section 15(a)(3) is only partial. In a word, the ruling vitiates the force of Section 15(a)(3) and operates to undermine the administrative and enforcement procedures essential to the attainment of the basic statutory policy, which, for the reasons stated above, depend heavily upon the participation of employees as complainants and witnesses.⁵

⁵ Cf. *Phelps Dodge*, *supra*, 313 U.S. at 185: "The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of

B

When a court's equity jurisdiction is invoked under a regulatory statute, its inherent equitable powers are available to effectuate the legislative prohibitions and policy, unless the statute expressly provides otherwise.

To read restrictively the general jurisdictional language of Section 17—"to restrain violations"—without regard to this main objective of the statutory prohibition of discrimination, as the court below did, is to miss the "central clue" to the scope of the jurisdiction intended and to reduce its substance to "a bit of verbal logic from which the meaning of things has evaporated" (*Phelps Dodge, supra*, 313 U.S. at 190-191). Both in reasoning and result, the decision below is at variance with this Court's numerous decisions dealing with various kinds of comparable regulatory legislation (labor relations laws, the anti-trust laws, price and rent control laws), which consistently apply the time-honored fundamental principle that it is the duty of a court, and within its inherent equity power, "to give effect to the policy of Congress" whenever its jurisdiction to restrain or enforce a legislative prohibition is invoked under the governing act, and "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Co.*, 328 U.S. 395, 398, 400. The application of this controlling principle does not

organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace."

depend upon authorization by Congress of specific types of equitable remedies or the use in the statute of special phrases such as "enforce compliance" or "effectuate policies" or "issue necessary orders". Rather, the principle is as broad as it was formulated in *Porter v. Warner Co.*

1. *The general principle.*

Contrary to the assumption of the court below (R. 21), the underlying principle applied in *Porter v. Warner Co., supra*, was not one originated for and restricted to the terms and policy of the particular price-control legislation there involved. As explicitly stated in *Porter*, the source of the principle dates back to more than century-old decisions which recognized as fundamental law that whenever a court's equity jurisdiction is invoked, "it is the duty of the courts to execute the policy" of the legislature and to utilize the "inherent [power] in the courts of equity" to order such affirmative relief as will "give effect to the policy of the legislature" (*Clark v. Smith*, 13 Pet. 195, 203 (1839), cited in *Porter*, 328 U.S. at 400), and "[t]he great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." (*Brown v. Swan*, 10 Pet. 497, 503 (1836), quoted in 328 U.S. at 398).

Clearly the duty of the court to "give effect to the policy of the legislature" is no less when the exercise of its equity jurisdiction "to restrain violations" is expressly invoked by statute, as here. Thus, equally applicable to this case is the holding of *Porter* that since "a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect

to its purposes" (328 U.S. at 400),⁶ the court had power to direct such restitution unless authority to do so was denied "in so many words, or by a necessary and inescapable inference" (*id.* at 398).⁷

The decisions of this Court attest to the application of this basic principle to legislation providing no more, or even less, explicit jurisdiction than is conferred by Section 17 of this Act. While the statutes involved in *Porter v. Warner* and *Phelps Dodge* were more specific in describing the remedies for violations, both decisions upheld the court's power to order additional affirmative relief not explicitly authorized, on the ground that, because the jurisdiction granted was "an equitable one * * *, the comprehensiveness of this equitable juris-

⁶ Although the jurisdictional language in the instant statute is limited to the phrase "to restrain violations" (Section 17), it is evident that an order "to restrain violations" requires nothing less than full compliance.

⁷ It is clear from *Porter's* exposition of its underlying rationale that this ruling was not dependent upon the statutory phrase (in that Act) "or other order," as the court below assumed (R. 21). While the confirmatory effect of this phrase was noted (*id.* at 398-399), the decision was independently grounded on the premise that, because "the jurisdiction of the district court to enjoin acts and practices made illegal by the act" is "an equitable one" (*id.* at 397-398), "all the inherent equitable powers of the district court are available for the proper and complete exercise of that jurisdiction," "unless otherwise provided by statute."

United States v. Moore, 340 U.S. 616, reaffirmed "the broad ground of interpretation of the 'other orders' provision adopted in the [Porter v.] Warner case"—i.e., "the inherent equitable jurisdiction which is thus called into play * * * to give effect to the policy of Congress" (*id.* at 619), in sustaining an order for the restitution of excess rents issued without an injunction. See also *Woods v. McCord*, 175 F. 2d 919, 921 (C.A. 9); *McCoy v. Woods*, 177 F. 2d 354, 355 (C.A. 4); and *Creedon v. Randolph*, 165 F. 2d 918, 920, in which the Fifth Circuit upheld a similar order on the authority of *Porter*, saying: "It is a remedy which may be had in addition to the others set up in the Act" (emphasis added).

diction is not to be denied or limited in the absence of a clear and valid legislative command" (*Porter*, 328 U.S. at 398).

As we shall show, the equitable jurisdiction to order affirmative relief to "neutralize" and "rectify * * * existing wrongful conditions," including "quite drastic measures to achieve freedom from the influence of the unlawful" conduct, does not depend upon either explicit authorization of specific remedies, or upon an express authority to issue "other orders" to "effectuate the [statutory] policies." In particular, this Court's decisions dealing with labor relations statutes and with the anti-trust laws demonstrate beyond doubt, not only that general statutory authority "to restrain violations" includes the power to order reimbursement or reparation as an equitable adjunct to an injunction decreee, but also that utilization of the reimbursement remedy, no less than of reinstatement, is essential to achievement of the purpose of this Act's prohibition of discriminatory conduct and to effectuation of its basic substantive policy.

2. *Labor relations decisions*

(a). As already indicated (*supra*, pp. 14-18,) the main objective of the Fair Labor Standards Act's prohibition of discriminatory discharge of employees is closely analogous to that of the prohibition of unfair labor practices in the National Labor Relations Act, *i.e.*, to effectuate the substantive provisions and basic policy of the Act by providing that they be "safe-guarded through the authority conferred upon the Board [here the courts] to require the employer to desist from the unfair labor practices described and to leave the employees free" to pursue legitimate action

(see *Republic Steel Corp. v. Labor Board*, 311 U.S. 7, at 10). As this Court has repeatedly recognized, the Labor Board's experience has revealed that effectuation of the important national policy of that Act "generally requires" both remedies—"not only compensation for the loss of wages but also offers of employment to victims of discrimination," because "[o]nly thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination" (*Phelps Dodge, supra*, 313 U.S. at 194; *National Labor Relations Board v. Seven-Up Co.*, 344 U.S. 344, 345; *Republic Steel, supra*, 311 U.S. at 12). "Such a restoration of the situation as it would have been had the unfair labor practice not occurred is obviously needed to wipe out the coercive effect of the employer's conduct." See *National Labor Relations Board v. Waumbee Mills*, 114 F. 2d 226 at 235 (C.A. 1).⁸

As the Labor Board cases put it, restoration of wage losses, if not always an essential adjunct to reinstatement, is certainly the traditional appropriate "companion remedy of reinstatement," effectuation of the statutory policy depending upon "the practical interplay of [the] two remedies" (*Seven-Up, supra*, at 347, 348); reimbursement, no less than reinstatement, serves the function of "[m]aking the workers whole for losses suffered on account of an unfair labor practice," and is, therefore, as much a "part of the vindication of the

⁸ It may be noted that the conflict between *Waumbee Mills* and the Second Circuit's decision in *Phelps Dodge* (on the "main issue" whether the Board's powers included remedial orders not explicitly specified in the statute, see *infra*, pp. 27-28) led to the grant of certiorari and modification of the latter decision. See 313 U.S. at 181.

public policy which the Board enforces" (*Phelps Dodge, supra*, at 197). While undoubtedly "there are factors other than loss of wages *** to be considered" in giving effect to the declared statutory public policy, it has never been questioned that the reimbursement remedy is an appropriate, if not essential, adjunct to the "power to neutralize discrimination" and "to wipe out the prior discrimination" (*id.* at 192-193). The reimbursement remedy must be available to accomplish the purpose "to leave an employee, as nearly as possible, in the same situation he would have occupied, if there had been no discrimination against him" (*National Labor Relations Board v. Killoren, supra*, 122 F. 2d 609, 613). "[T]o limit the significance of discrimination" merely to reinstatement, no less than to limit its significance "merely to questions of monetary loss to workers," "would thwart the central purpose of the Act," (*cf. Phelps Dodge, supra*, at 193). For reimbursement to the victims of discrimination for wage losses is usually, if not always, as essential to "undoing the discrimination" and to "effective assurance" to employees of freedom to exercise their statutory rights as is reinstatement (*id.* at 193, 195).

Although reinstatement and back pay orders are today usually associated with the specific remedy provided by the National Labor Relations Act, long before the enactment of that Act such relief was recognized as an appropriate equitable measure to restrain violations of statutory prohibition of unfair labor practices and to correct or undo wrongs created by unlawful retaliatory discharge of employees. *Texas & N.O.R. Co. v. Railway Clerks*, 33 F. 2d 13 (C.A. 5), affirmed

281 U.S. 548.⁹ As stated in *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 188, the authority of a court of equity to order reinstatement with back pay was upheld in *Texas & N.O. R. Co. v. Railway Clerks* "even without * * * a mandate from Congress". The same reasoning was followed in *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 552 (not a restitution case), in which the Court declared that "[m]ore is involved than the settlement of a private controversy without appreciable consequences to the public", so that the bounds of equitable power assumed a broader and more flexible character than when only a private controversy is at stake (*ibid.*; see also *Porter v. Warner Co.*, 328 U.S. at 398). The fact that Congress in the Railway Labor Act made negotiation obligatory—as in Section 15(a)(3) of the Fair Labor Standards Act it has made discrimination unlawful—"is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief" (300 U.S. at 552).

(b). We submit that there is no warrant for the

⁹ In rejecting the contention that the rights created by the Railway Labor Act could not be enforced by legal proceedings because no remedy had been expressly given for redress, this Court said:

While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded. * * * If Congress intended that the prohibition, as thus construed, should be enforced, the courts would encounter no difficulty in fulfilling its purpose * * *

* * * As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated. [281 U.S. at 568-569; recently reaffirmed in *Leedom v. Kyne*, 358 U.S. 184, at 189.]

narrow view of these labor relations decisions taken by the court below, which rejected them as inapposite on the ground that the *Railway Clerks* case involved a reimbursement order issued in contempt proceedings and that *Phelps Dodge* involved an express statutory provision "to take such affirmative action" (R. 17). As the Second Circuit recognized in rejecting this distinction in *O'Grady* (146 F. 2d at 423), there is "little difference between giving reparation to an employee for loss of wages as ancillary to injunctive relief against withholding employment and giving back pay where an injunction for reinstatement has been violated * * *." In either case, "such reparation is necessary to restore the status quo" disturbed by the employer's wrongful violation of the rights accorded by the statute (*ibid.*).

Far from limiting itself to considerations relating to contempt, the *Railway Clerks* decision proceeded on the general principle that a statutory legal right does not require an express statutory provision to make it enforceable, and that, since the statute imposed requirements upon the employer with respect to the employees' free choice of representatives, those requirements were "susceptible of enforcement by proceedings appropriate [thereto]," despite the silence of the statute as to enforcement (281 U.S. at 569-570). As indicated above, this reasoning was followed in *Virginian Ry. supra*, in which contempt was in no way involved. Relying solely on the substantive requirement of the statute that the employer "treat with" the certified representatives of its employees, and without any express statutory authority for enforcement by equitable decree, the Court sustained a mandatory injunction requiring

the railway to "treat with" the union and to "exert every reasonable effort to make and maintain agreements concerning rates of pay * * * and to settle all disputes" (*id.* at 544). It was "not open to doubt," the Court said, that "Congress intended that this requirement * * * be enforced by the courts" (*id.* at 545).¹⁰

The decision below likewise misreads *Phelps Dodge* as being dependent on the express statutory authorization in the National Labor Relations Act of back-pay orders. Although that authorization of "back pay" was limited to "reinstatement of employees," the Board's power to require offers of jobs to applicants "seeking new employment" and to order that they be

¹⁰ Significantly, both the District Court and the Court of Appeals in the *Railway Clerks* case, in holding the restitution order to be sufficiently grounded upon the equitable power to restore the *status quo ante* (25 F. 2d at 877; 33 F. 2d at 17), relied for authority on *Texas & New Orleans R.R. v. Northside Belt Ry.*, 276 U.S. 475, a case which was not a contempt proceeding, but an original suit for injunction. In turn, the *Railway Clerks* case has been cited by this Court as authority for the issuance of a back-pay order in proceedings under the National Labor Relations Act in which contempt of court (or of the Board) was not involved. *Phelps Dodge*, 313 U.S. at 188. Cf. also *Steele v. L. & N.R. Co.*, 323 U.S. 192, holding that, since the Railway Labor Act made no express provision for the enforcement of the right it conferred upon each railroad employee to be represented by the statutory exclusive bargaining agent of his unit, the statute must be taken as "contemplat[ing] resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty" (*id.*, at 207). The Court rested its holding on the principle expressed *obiter* in *Switchmen's Union v. National Mediation Board* (320 U.S. 297, 300) as being the "purport" of the *Railway Clerks* and the *Virginian Ry.* cases: "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." The Court has had recent occasion to confirm this principle in *Leedom v. Kyne*, 358 U.S. 184, 189-190.

"made whole for their loss of pay" was sustained (313 U.S. at 188, 189, 196-197). The Board's power to make such an order "does not derive" from the statutory language relating to "back pay," said the Court, "and is not limited by it" (*id.* at 191), but derives from the more general jurisdiction of the Board to "effectuate the policies" of the Act (*id.* at 189).¹¹ See also *Agwilines v. National Labor Relations Board*, 87 F. 2d 146, 151, where the Fifth Circuit recognized that "[s]tatutory provisions of this kind in the public interest * * * provide for public proceedings, equitable in their nature [and] exert power to restore status disturbed in violation of statutory injunction similar to that exerted by a chancellor in issuing mandatory orders to restore status" (citing among others the *Railway Clerks* and the *Northside Belt* decisions, *supra*). In short, the Board's power to issue such orders derives from its authority, equivalent to that inherent in the jurisdiction of a court of equity, "without such a mandate from Congress," "to enforce the legislative policy against discrimination" (*id.* at 188). The same considerations compel the conclusion that the reimbursement remedy is also within a court's jurisdiction "to restrain violations" of the Fair Labor Standards Act's prohibition against discriminatory practices.¹²

¹¹ To the same effect, see *National Labor Relations Board v. Waumbec Mills*, 114 F. 2d 226, 234-235 (C.A. 1) (holding that the express authorization in the National Labor Relations Act did not prescribe the limits of the Board's power to issue back pay orders, but was "probably inserted out of abundant caution to illustrate a type of relief appropriate to [a] commonly recurring [type of] unfair labor practice").

¹² See *Regal Knitwear Co. v. Labor Board*, 324 U.S. 9, at 14, where it is noted that "an injunction to restrain violation of the Fair Labor Standards Act * * * is somewhat analogous to Labor Board orders * * *."

That there is no provision in the Fair Labor Standards Act expressly authorizing orders to "effectuate" the Act merely reflects the fact that the enforcement of this Act, like the Railway Labor Act (see *supra*, pp. 24-27) and the anti-trust laws (see *infra*, p. 30 *et seq.*), is directly entrusted to courts of equity. Instead of creating an administrative agency or board with only such powers as the statute confers, the Fair Labor Standards Act relies on the pre-existing system of courts in possession of traditional powers needing no confirmation. Such a statute has no need to specify the powers to be used in the exercise of the jurisdiction granted, but must rather specify the particular powers intended to be excluded (if any), as is done in the proviso to Section 17 discussed below (pp. 35-40).¹³ That the exercise of such equity powers does not depend upon an express statutory direction to "effectuate the policies" of the Act is conclusively demonstrated, we submit, by the anti-trust decisions, which have con-

¹³ In conformity with this view, see *United States v. International Longshoremen's Ass'n*, 147 F. Supp. 425 (S.D. N.Y.), where a mandatory order was issued under a statutory provision which merely granted authority, under stated conditions, to "enjoin [an emergency] strike or lock-out or the continuing thereof" (Labor Management Relations Act of 1947, Sec. 208, 61 Stat. 155, 29 U.S.C. 178). Having issued an order enjoining continuance of a strike under this provision, the court added the requirements that the employees be paid for the duration of the injunction at the rates fixed by the expired contract, and that any wage adjustments reached in settlement negotiations be made retroactive. As in the cases discussed above, there was no provision for such orders in the statute; they were devised by the court as appropriate adjuncts to the expressly authorized injunction in order to meet the equities of the case before it; "[p]lainly," the court said by way of explanation, "equity requires that if employees are to be restrained from striking during this cooling-off period the employers must equally be restrained from reducing their pay" (147 F. Supp. at 427).

sistently recognized the power (and duty) of the court to issue affirmative orders similar to, and fully as broad in scope as, the Labor Board's orders. See *infra*, pp. 30-34.

3. Anti-trust decisions

The jurisdiction conferred by the Anti-Trust Act to "prevent and restrain violations" (26 Stat. 209, Section 4; 15 U.S.C. 4)—language precisely equivalent to that of Section 17 of the Fair Labor Standards Act—has always been construed as including "the duty to enforce the statute" by "the usual powers of a court of equity to adapt its remedies" to the execution of the statutory policy, including "the application of broader and more controlling remedies" than the mere "prohibition of future acts." *United States v. United States Steel Corp.*, 251 U.S. 417, 451-452; *Standard Oil Co. v. United States*, 221 U.S. 1, 77-78; *United States v. American Tobacco Co.*, 221 U.S. 106, 184-185. Significantly, the standards for determining the scope of affirmative relief authorized in anti-trust decrees have been stated in terms virtually identical to the standards applied in the Labor Board cases, *i.e.*, to "neutralize," "wipe out," or "undo" the continuing effects of past unlawful conduct, and to "redress" wrongs and restore "as near as possible * * * the [prior] *status quo*." *International Boxing Club v. United States*, 358 U.S. 242, 258.

In the early decisions, it was specifically held (while noting that "penalties which are not authorized by law may not be inflicted by judicial authority") that "the application of remedies two-fold in character" was available and "essential" "to the end that the pro-

hibitions of the statute may have complete and operative force"—i.e., in addition to (1) forbidding future acts violative of the statute, (2) "[t]he exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about" (*Standard Oil Co. v. United States*, 221 U.S. at 77-78). It was assumed, without question, that the authority "to prevent and restrain violations" included "[t]he duty of giving complete and efficacious effect to the prohibitions of the statute" and, therefore, the power "to award relief coterminous with the ultimate redress of the wrongs which we find to exist" (*American Tobacco*, 221 U.S. at 184-185) and to remedy "the condition which has been brought about in violation of the statute" (*Standard Oil*, at 77).

As noted in the more recent anti-trust decisions, this Court "has quite consistently recognized * * * that the government should not be confined to an injunction against further violations." *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189. The Court has held that "The court was bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival" (*Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 461), and that "[t]he essential consideration is that the remedy shall be as effective and fair as possible in preventing continued or future violations * * *" —that "[t]he purpose of the decree * * * is effective and fair enforcement" (*United States v. National Lead Co.*, 332 U.S. 319, 335, 338). It has been recognized that in the enforcement of the Anti-Trust Act the courts

may exercise "equity's authority to use quite drastic measures to achieve freedom from the influence of the unlawful restraint" and may order such affirmative action as might be "reasonably necessary to wipe out the illegal [fruits]" thereof (*United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 726).

Accordingly, in *Bausch & Lomb* an order directing the cancellation of resale price maintenance contracts theretofore executed was upheld; and the Court has repeatedly sustained orders requiring the divestiture of interests, the "undoing" of the continued effect of unlawful conduct, and similar corrective measures "conducive to the elimination of the old illegal practices." *International Boxing Club v. United States*, 358 U.S. 242, 253-261; *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 126-130; *United States v. Paramount Pictures*, 334 U.S. 131, 170-174; *United States v. Griffith*, 334 U.S. 100; *United States v. Crescent Amusement Co.*, 323 U.S. at 189-190; *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 78.

None of these orders was within powers "expressly conferred" by the anti-trust law under which they were issued, or "necessarily implied" by any specific provisions of that Act—as would be required by the test laid down by the court below. They were sustained on the ground that, in a suit "to restrain violations," the function of the district court "does not end with enjoining continuance of the unlawful restraints nor with dissolving the combination which launched the conspiracy [but] includes undoing what the conspiracy achieved"; for "[o]therwise, there would be reward from the conspiracy through retention of its fruits" (see *Paramount Pictures*, 334 U.S. at 171), or a con-

tinuation of "the condition which has been brought about in violation of the statute" (*Standard Oil*, 221 U.S. at 77-78), which "is itself the violation" (*International Boxing Club*, 358 U.S.-at 253). Because of the court's "duty to enforce the statute," as this Court has often held, these remedies are available to "neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about" (*Standard Oil*, 221 U.S. at 78), to "rectify such existing wrongful condition" (*American Tobacco*, 221 U.S. at 185), and "to return the parties as near as possible to the *status quo* existing prior to the conspiracy" (*International Boxing Club*, 358 U.S. at 258).

Indeed, such a remedial equitable measure need not even be viewed merely as *ancillary* to the injunctive relief specified by the statute. In a case such as this, the reimbursement decree is in itself an order to "restrain violations" within the express terms of Section 17 of the Fair Labor Standards Act. For the discrimination forbidden by the Act does not cease upon the reinstatement of the employee, if he returns irremediably disadvantaged by the loss of income for the prior period. Its intimidating effect to deter employees from legitimate participation in the enforcement of the statutory standards remains as a "continually operating force," which the employer's unlawful conduct "has brought and will continue to bring about," in defiance of the statutory policy. This continuing condition "is itself the violation." See *Standard Oil Co. v. United States*, 221 U.S. 1, at 77-78, *International Boxing Club v. United States*; 358 U.S. 242, 253, and the other anti-trust decisions, discussed *supra*, p. 30 ff.). Unless the

employer is required to equalize the positions of those employees who participated in proceedings under the Act and those who did not, the discrimination continues, as does the consequent pressure upon employees to accept violations of the Act without protest. An injunction directed only to new discriminations would not restrain these continuing violations or protect the public interest as Congress intended. Only a reimbursement order could terminate the existing state of discrimination and intimidation.

In short, the ground on which the court below rested its decision is plainly inconsistent with the fundamental principle—repeatedly recognized by this Court in rulings on various types of legislation comparable to the Act here in issue—that it is the duty of the court under its inherent equity power to “give effect to the policy of Congress,” and to grant whatever affirmative relief is appropriate to that end, whenever its jurisdiction to restrain or enforce a legislative prohibition is invoked, unless that power has been restricted expressly or by necessary implication. There is nothing in the language, the legislative history, or the substantive context of the Fair Labor Standards Act to suggest that this basic principle is not equally applicable here; on the contrary, every pertinent consideration requires the application of the principle to the jurisdiction granted by this Act to restrain the discriminatory conduct prohibited by Section 15 (a) (3).¹⁴

¹⁴ If any discretion be deemed to be lodged in the district court to refrain from ordering restitution in certain cases, certainly this is not such a case. The court found the discrimination exercised

C.

The Proviso Added to Section 17 by the 1949 Amendment Does Not, By Its Terms or Legislative Intent, Limit the Court's Jurisdiction to Order Reimbursement for Wage Loss Resulting from Discriminatory Discharge

The Fair Labor Standards Amendments of 1949 added to Section 17 (*supra*, p. 3) the following proviso:

* * * *Provided*, That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of *unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages* in such action.
[Emphasis added.]

As the court below correctly recognized, this proviso, in terms, deals "solely with the minimum wage and overtime compensation provisions" (R. 20), and not with the discrimination provision which alone is pertinent here. Accordingly, although its rejection of the Second Circuit's *O'Grady* decision (*supra*, pp. 13-16) seems to have been influenced by the view that Congress intended by the proviso to "repudiate the doctrine of the *O'Grady* case," the court below expressly dis-

by respondents to be "clear and convincing" (R. 11; Concl. 4) and it found no mitigating circumstances whatever. There were, in actual fact, no mitigating circumstances so far as the employer's conduct was concerned; and, with respect to at least one of the discharged employees (Elizabeth Duke), there were no circumstances enabling any mitigation at all of the resulting wage losses. See the Statement, *supra*, pp. 3-4, 5, fn. 1.

claimed reliance on the proviso as a ground of decision (*ibid.*). Its view of the Congressional purpose in enacting the proviso, however, is just as erroneous as its position on the scope of the jurisdiction conferred by Section 17 prior to the 1949 amendment.

The proviso was enacted shortly after the decision in *McComb v. Scerbo*, 177 F. 2d 137, in which the Second Circuit, in a proceeding under Section 17, sustained an order requiring an employer to reimburse his employees for *unpaid minimum wages and overtime compensation*. There had theretofore been other cases in which orders for the restitution of such deficiencies had been issued. *Fleming v. Alderman*, 51 F. Supp. 800 (D. Conn.); *Walling v. Miller*, 138 F. 2d 629 (C.A. 8), certiorari denied, 321 U.S. 784 (in which the majority opinion sustained the order on the ground that the employer had not objected below, with Judge Woodrough concurring on the ground that a back-pay order was authorized and indispensable in the premises); and *Fleming v. Warschawsky Co.*, 123 F. 2d 622 (C.A. 7), enforcing a consent order in contempt proceedings. In addition, the *O'Grady* decision had sustained a back-pay order for reimbursement for wage losses in a *discrimination* case. 146 F. 2d 422.

Accordingly, when the proviso was enacted in 1949, the existing case law was to the effect that restoration or reimbursement orders were authorized regardless of the type of violation found. A "repudiation" of the *O'Grady* decision could easily have been effected by an unqualified general withdrawal of the power to order any monetary reimbursement for prior violations. But, instead, Congress carefully articulated a withdrawal of

restitution power which precisely prescribed the orders in the *Scerbo* type of case, and in language inapplicable to the type of order in *O'Grady*.

The reason for the precise delimitation of the proviso is clear from a consideration of a related amendment simultaneously enacted. That change added Section 16(c) to the Act, authorizing the Secretary of Labor, for the first time, to bring suits *at law* to recover "the unpaid minimum wages or the unpaid overtime compensation" claimed "under section 6 or section 7 [the compensation provisions] of this Act." This authority was in addition to (but conditioned upon waiver of) the already existing authority in Section 16(b) for employees themselves to sue for "their unpaid minimum wages, or their unpaid overtime compensation * * * [and] additional equal amount as liquidated damages."

The inference is inescapable that the two 1949 amendments were meant to complement each other, and that recourse in equity was being withdrawn by the new proviso to Section 17 because a corresponding remedy at law was being provided by the new subsection of Section 16. This inference is confirmed by the report of the House Conferees on the insertion of the proviso into the bill in conference. The conferees reported:

This proviso has been inserted in section 17 of the act in view of the provision of the conference agreement contained in section 16(c) of the act which authorizes the Administrator in certain cases to bring suits for damages for unpaid minimum wages and overtime compensation owing to

employees at the written request of such employees.¹⁵

Since, as the House Conferees' report notes, the new Section 16(c) relates to suits for underpayments due under the compensation provisions of the Act, the conferees' explanation of the Section 17 proviso's origin leaves no doubt that the formulation of the provision in terms appropriate only to violations of the compensation provisions was intentional. There is no basis for the inference drawn by the court below that, when the conferees reported that the proviso "would have the effect of reversing such decisions as *McComb v. Scerbo*" (*ibid.*), the *O'Grady* case was one of the decisions the conferees had in mind (R. 20): As noted above (p. 36), there were outstanding other decisions like *Scerbo* (involving re-tuition for underpayments of minimum wage and overtime compensation).

The enactment of the proviso in 1949, in prohibiting specified types of reimbursement orders, confirmed the conclusion theretofore reached by the courts (*supra*, p. 36) that reimbursement orders are within the Section 17 jurisdiction "to restrain violations," except as specifically excluded. In omitting the *O'Grady* type of order from those specified for future exclusion, the action of Congress in enacting the proviso constituted, we submit, a confirmation rather than a repudiation of *O'Grady*. In the only case, other than the instant

¹⁵ Statement of the Managers on the Part of the House, Rept. No. 1453 on H. R. 5856, 81st Cong., 1st Sess., p. 32. See also Report of the Majority of the Senate Conferees, 95 Cong. Rec. 14879, to the same effect. The House Statement is the legislative history to which the trial court referred in its Conclusions of Law by its citation to U.S. Code Congressional Service, 1949, p. 2272 (Concl. 5, R. 11-12).

one, in which a discriminatory discharge was proved after the enactment of the proviso, a back-pay order was held to be authorized. *Mitchell v. Equitable Beneficial Co.*, 13 WH Cases 606 (D.C. N.J., March 11, 1958, not officially reported).

Unlike damages resulting from unpaid compensation, if relief is not available under Section 17 for financial loss resulting from unlawful discharge, then relief is not available under the Fair Labor Standards Act at all. The damage suits authorized by Sections 16(b) and 16(c) are expressly limited to suits for the recovery of Sections 6 and 7 wage underpayments, and there is no provision for recovery of damages for unlawful discharge. *Powell v. Washington Post Co.*, C.A.D.C., 14 WH Cases 140, certiorari denied, June 29, 1959, No. 937, Oct. Term 1958; *Bonner v. Elizabeth Arden, Inc.*, 177 F. 2d 703, 705 (C.A.2). Criminal prosecution under Section 16(a) is likewise ineffectual to achieve the full objective of Section 15(a)(3), for the employee is not freed from the intimidation inherent in his vulnerability to economic loss at the hands of his employer by the knowledge that his employer may have to account to the Government.¹⁶

There is, thus, special reason for application of the principle that the court's "equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command" and "'not be yielded to light inferences, or doubtful construction'" (*Porter v. Warner Co.*, *supra*, 328 U.S. at 398). Since the view expressed by the decision below is, at the very least, a

¹⁶ In the instant case, the payment of a substantial fine by the employer, in the criminal prosecution for violations of the Act's substantive requirements, did not protect the employees from discriminatory discharge a few weeks later (*supra*, pp. 3-4).

"doubtful construction" of the proviso to Section 17, there is no warrant for straining to draw the unsubstantiated inference that Congress intended to exclude the essential reimbursement remedy for losses resulting from discriminatory conduct. As stated in *O'Grady*, since "an injunction to prevent its continuance would have been proper under Section 17 as soon as the discharge took place", it is "unreasonable to suppose that the failure immediately to prevent it left the employee without remedy for loss of wages in the meantime * * *" (146 F. 2d at 423). In the absence of express or clear evidence of legislative intent to the contrary, we submit that doubt should be resolved in favor of this "equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project." Cf. *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 128.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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AUGUST, 1959.

APPENDIX

The pertinent provisions of the Fair Labor Standards Act, Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended by the Fair Labor Standards Amendments of 1949 and of 1955, c. 736, 63 Stat. 910; c. 867, 69 Stat. 711, 29 U.S.C. 201 *et seq.*, are as follows:

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—(1) not less than \$1 an hour; * * *.

MAXIMUM HOURS

SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

* * * *

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Secretary issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee; * * *.

PENALTIES

* * * * *

SEC. 16. (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated * * *.

(c) The Secretary of Labor is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or section 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidate damages. When a written request is filed by any employee with the Secretary claiming unpaid minimum wages or unpaid overtime compensation under section 6 or

section 7 of this Act, the Secretary may bring an action in any court of competent jurisdiction to recover the amount of such claim: * * * The consent of any employee to the bringing of any such action by the Secretary, unless such action is dismissed without prejudice on motion of the Secretary, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. * * *

INJUNCTION PROCEEDINGS

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

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FILED

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BROWNING, Clerk

Supreme Court of the United States

October Term, 1959.

No. 39

**JAMES P. MITCHELL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Petitioner,**

versus

**ROBERT DeMARIO JEWELRY, INC., ET AL.,
Respondents.**

**On Writ of Certiorari to the United States Court of
Appeals for the Fifth Circuit.**

BRIEF FOR THE RESPONDENTS.

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September, 1959.

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IN THE SUPREME COURT OF THE UNITED STATES.

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**On Writ of Certiorari to the United States Court of
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BRIEF FOR THE RESPONDENTS.

STATEMENT.

The statement of the case in petitioner's brief is adequate and correct, except that the statement on page 5 of the brief referring to the District Court's refusal to grant reimbursement for lost wages "without finding any mitigating circumstances with respect either to the unlawful discrimination or to the resulting wage losses" could be misleading in that, although the trial court did not

state its reasons other than the "exercise of the court's discretion" for declining to order payment for lost wages, obviously some factor or factors in the case motivated the court in this decision. Whatever the reasons, they are not apparent from the printed record here in this case.¹

SUMMARY OF ARGUMENT.

I.

The district courts do not have jurisdiction under the Fair Labor Standards Act to order reimbursement for loss of wages resulting from unlawful discriminatory discharge in violation of Section 15 (a)(3) of the Act. Petitioner's arguments are to the effect that this power should exist; that the Secretary needs such power for effective enforcement of the Act; and that without such power in the court the employee is not fully protected from loss of wages between discharge and reinstatement. We contend that such arguments should be directed to Congress.

¹ The first footnote on page 5 of petitioner's brief states that Elizabeth Duke "had been unemployed at all times since her discharge, although she had actively sought employment and was at all times ready and able to work (Tr. 34-35, 297)." We do not view these considerations as relevant in this Court's review of the case. The question here involves the jurisdiction of the district court. The question regarding abuse of discretion by the trial court would require a review of the evidence, which in this case included, by stipulation, all of the evidence and testimony in two cases involving wage suits for 13 employees: *James P. Mitchell v. Robert DeMario Jewelry, Inc., and Robert DeMario*, Civil Actions Nos. 649 and 654, U.S.D.C., Middle District of Georgia. The trial of the three cases involved over 20 witnesses and 4 days. We comment upon the exercise of the court's discretion under argument II in this brief.

A.

1. The Fair Labor Standards Act did not originally grant such power to the district courts; nor is such power derived from the ancillary powers of equity jurisdiction. Section 17 of the Act grants the court the power "to restrain violations of Section 15". The prohibited acts enumerated in Section 15 are of the nature that the restraint of future violation thereof by an injunction, acting prospectively, would carry out the policy and purposes expressed in the Act, and only in the event of a discharge, which had already occurred, would it be necessary to order the restoration of the status quo, which would be effected by the offer of reinstatement without any "restitution". The absence of any provision in the Act to validate a claim for lost wages shows a policy not to permit such restitution as one of the means of enforcement. The courts give effect to the plain unambiguous meaning of a statute, and do not extend it to cases not within its words.

2. Nor can equity use "ancillary" power to order payment of such lost wages. Petitioner urges that such power exists in equity to make restraint effective and to vindicate public policy. There being no legal right in the employee to recover such lost, or ad interim, wages, no legal or equitable relief can be granted. Equity follows the law. Furthermore, such damages, not having any basis in the statute, become punitive—for the vindication of society—and equity will not assess punitive damages in the absence of specific statutory provision therefor. Ancillary powers of equity refer to

the exercise of legal powers in conjunction with equitable powers subordinate to the principal equitable proceeding.

The contempt cases relied upon by petitioner and some courts as a basis for mandatory orders to "restore the status quo" are not authority for the power of equity to expand a statute or the jurisdiction of the court thereunder. The power to protect itself in its own decree does not expand the court's power to decree.

The burden upon the employee in losing wages between unlawful discharge and reinstatement is not one Congress has seen fit to relieve; nor is it so unusual a burden; for everyone who resorts to the courts to enforce legal rights are faced with the delays of litigation and resulting losses caused thereby. The delays are more the fault of enforcement than of the Act itself. The similar plea of an employer in an effort to show the inequity of a certain construction of another statute was ignored by the court. See *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177.

3. The decision in *Walling v. O'Grady*, 146 F.2d 422, is not authoritative, having been based upon erroneous assumptions and having misconstrued and misapplied the powers of equity. It assumed a legal right in the employee to recover lost wages; it failed to distinguish between the power of equity in contempt cases and the ancillary powers of equity in cases of this sort; and it argued that the employee is left without adequate protection. The court grounded its decision in the tradi-

tional powers of equity following Judge Woodrough's concurring opinion in *Walling v. Miller*, 138 F.2d 629, 633; but the application of this principle under the O'Grady facts was erroneous.

4. Petitioner, not finding language in the Fair Labor Standards Act granting the power sought here, calls upon other enactments and decisions thereunder as the basis for such power. But in each statute cited there is ample specific language, or general power granted, upon which the courts, in construing those statutes, based their decisions. The National Labor Relations Act, 29 U.S.C.A. 151, et seq., is broader in scope and its enforcement machinery accordingly more extensive, as evidenced by a comparison with the Fair Labor Standards Act—the definitions of employee; the "affecting commerce" of the National Labor Relations Act as against the "production of goods for commerce" of the Fair Labor Standards Act; the "affirmative action . . . as will effectuate the policies of the Act" of the former as against the "restrain violations" of the latter. The court in *Phelps Dodge*, *supra*, upon which petitioner heavily relies, in granting reinstatement with back pay to persons who were refused employment because of union affiliation found ample basis for its decision in the language of the National Labor Relations Act wherein the "employee" is broadly defined and wherein it is declared to be an unfair labor practice for an employer to discourage membership in any labor organization by discrimination in regard to "hire". Using the "affirmative action" authorized by the Act, including the power to grant "back pay," the court made a sound decision. The absence of such lan-

guage in the Fair Labor Standards Act, which was enacted after the National Labor Relations Act, is significant. The policies to be followed in a statute must be found in the language of the Act itself, and the machinery to effectuate the purposes of the Act must be more specific than the mere declaration of a policy. Similarly, the Antitrust decisions find their basis in the language of the Antitrust laws, and although the language there is more general than that of the National Labor Relations Act, the mandate there to enjoin or otherwise prohibit violations amply justifies the dissolution of the combinations and conspiracies which are violative of the statute, and the disgorging of unlawful fruits is part of the prohibition of the violation, unlike the penalty of an award for lost wages against an employer under the Fair Labor Standards Act who in fact retains no "illegal fruits" as a result of his unlawful act in discriminatorily discharging the employee. The Emergency Price Control Act, 50 U.S.C.A. App. 901, et seq., provided for enforcement by injunction or "other order" as well as an action in favor of the tenant against the landlord to recover excess rent. The court in *Porter v. Warner*, 328 U.S. 395, did not exceed the proper exercise of equitable powers in granting to the tenant the excess rent ancillary to the injunction proceeding, because there was a legal basis for the award. Further, the court was interpreting an emergency act and for this reason it may well have been justified in retrieving the excess rent in that proceeding although the better procedure might be in most cases of that type to treat the separate provisions of the statute providing

for injunction and the award of excess rent as exclusive of each other. The 1949 proviso to Section 17 of the Fair Labor Standards Act is indicative of this policy of Congress.

B.

If the district courts previously had the power under Section 17 of the Fair Labor Standards Act to order reimbursement for loss of wages resulting from unlawful discriminatory discharge, such jurisdiction was withdrawn under the 1949 proviso added to Section 17 of the Act. While petitioner and the Circuit Court treated the p. viso as dealing solely with the minimum wage and overtime compensation provisions, it is possible to construe the proviso as dealing also with any lost or ad interim wages recoverable by an employee, or for him by the Secretary, on account of unlawful discharge. However, the legislative history of the proviso, together with an analysis of the reasoning of the court in the *O'Grady* case and in *McComb v. Scerbo*, 177 F.2d 137, shows that the Congress intended, by the proviso, to reverse both decisions. See Committee Report, Statement of the Managers on the Part of the House, Rept. No. 1453 on H.R. 5856, 81st Cong., 1st Sess., p. 32; U.S. Code Congressional Service, 1949, p. 2251, 2273. Both the *O'Grady* and *Scerbo* cases rely on *Walling v. Miller*, *supra*, particularly the concurring opinion of Judge Woodrough (at page 633), who found the power to grant the wages (actually worked for in the *Miller* case) within the traditional powers of equity to "restrain". The courts in these cases treated them as indistinguish-

able, and they come within "such decisions" as Congress intended to reverse by the proviso.

II.

If the district courts have power to order reimbursement for loss of wages resulting from unlawful discharge under the Act in suits for injunction brought by the Secretary, the court, sitting as a court of equity, is not deprived of discretion in granting or denying such wages or damages. Petitioner indicates that it may be mandatory upon the court in such a case as this to grant such damages or lost wages; but petitioner throughout his argument calls upon the broad, comprehensive, traditional powers of equity as a basis for the power sought while attempting to deny equity its broadest, most comprehensive and traditional power, the exercise of discretion, the very essence of equity. An appeal to equity jurisdiction is an appeal to the sound discretion of the court.

ARGUMENT.

I.

The jurisdiction granted by Section 17 of the Fair Labor Standards Act "to restrain violations" does not include the power to order reimbursement for loss of wages resulting from unlawful discriminatory discharge of employees in violation of Section 15 (a)(3) of the Act.

Petitioner finds in the Fair Labor Standards Act the power in the district courts to grant "reimbursement

for loss of "wages" resulting from discriminatory discharge. This power is not spelled out specifically in the Act, nor is it referred to generally therein, but, petitioner argues, it is power "ancillary" to the authority "to restrain violations", and comes within the "inherent equitable powers" available "to give effect to the policy of Congress."

An analysis of petitioner's position shows, however, that he finds the purposes and policies, and the machinery, relating to loss of wages from discriminatory discharge not in the Fair Labor Standards Act, but in the National Labor Relations Act. (Petitioner's Brief, pages 7, 15, 16, 22-30); and he draws analogies between the Fair Labor Standards Act and other statutes for this jurisdiction and power. Actually the burden of petitioner's argument is that the power *should* exist; that the Secretary needs such power for effective enforcement of the Act; and that the failure so to interpret the Act falls short of full protection to the employee. We believe that these arguments should be directed to Congress, for we find nothing in the Act to substantiate petitioner's position.

A.

The district courts were not originally granted the power, under Section 17 of the Fair Labor Standards Act, to order reimbursement for loss of wages resulting from discriminatory discharge of employees in violation of Section 15 (a)(3) of the Act; nor is such power derived from the ancillary powers of equity jurisdiction.

1. *The Fair Labor Standards Act.*

There is no specific language in the Act² to authorize the court to grant "lost wages" resulting from discriminatory discharge. Section 17 of the Act grants the district courts jurisdiction "to restrain violations of Section 15." The latter section enumerates five types of unlawful acts: to transport goods in commerce, to pay less than minimum wages, to discharge or in any other manner discriminate against any employee, to violate the child labor provisions, and to violate the record keeping provisions. "To restrain" these violations is to stop them. In every case the injunction would, and could, normally be prospective in nature. Logically, to "restrain" a discharge which had already occurred, the court would order the discrimination (in preventing the employee from working) to cease. Nothing in the Act permits damages for the unlawful discharge, or provides for an order of "restitution". If there is a *status quo* to be restored by the injunction, it is the reinstatement of the employee to his job: that was the status when the unlawful act occurred. Even assuming for the moment that a court of equity within its inherent power might grant such lost wages ancillary to an order for reinstatement, would it be fully justified in doing so under so limited an enactment, especially where the statute provides for reimbursement of unpaid minimum and overtime wages, but is silent as to wages lost because of discharge. The absence of such a remedial provision makes it appear that it was not

² Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910, 29 U.S.C.A. 201 et seq.

the "policy of the Act" to validate a claim for such lost wages. The purpose of the Act was to eliminate certain conditions, but this apparently was not one of the vehicles to effectuate this purpose. The whole Act must be considered in order to determine the policy to be followed in effectuating its purposes.

"The intention of the legislature is to be obtained primarily from the language used in the statute. The court must impartially and without bias review the written words of the Act, being aided in their interpretation by the canons of construction. Where the language of a statute is plain and unambiguous, there is no occasion for construction even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning and cannot be extended beyond it because of some supposed policy of the law or because the legislature did not use proper words to express its meaning, or the court would be assuming legislative authority." 59 C.J., Statutes, Sec. 569, pp. 952-957. The statute must be construed consistent with principles of law (id. at p. 958), the doctrine of "equitable construction wherein a statute is extended to cases not within its words, having been abandoned" (id. Sec. 572, p. 964). Words used in a statute mean what they say; they are attributed ordinary meaning (id. Sec. 577, p. 975), or legal or common-law meaning (id. Sec. 578, p. 979). The word "restrain", which petitioner reads or construes to read "restrain and order payment of

damages", means, in this sense "to prohibit from action" or "to enjoin (in equity)". Black's Law Dictionary. This word is not enough upon which to build a cause of action in the employee, or a cause of action in the Secretary to sue for damages on behalf of the employee.

2. Ancillary power of equity.

Nor can equity, under the guise of effectuating general policy, use "ancillary" power to order payment of wages lost as a result of unlawful discharge. Petitioner urges that this power exists, and should be used to make the restraint effective and to vindicate public policy (Petitioner's Brief, p. 9), arguing that the court's power does not depend upon specific statutory authorization (Petitioner's Brief, p. 10). We have found no specific statutory authorization for the Secretary to sue for such ad interim wages on behalf of the government or the employee, nor does the statute confer jurisdiction upon the district courts over a civil suit to recover damages for discriminatory discharge. *Bonner v. Elizabeth Arden, Inc.*, 177 F.2d 703; *Powell v. Washington Post* (C.A.D.C.), 14 WH Cases 140. No such cause of action exists at common law in the absence of the breach of an employment contract for a definite term (see 30 C.J., Master and Servant, Sec. 95; 35 Am. Jur., Master and Servant, Sec. 34) and certainly it does not exist in the State of Georgia. *Jackson v. Atlantic Coast Line R.R.*, 8 Ga. App. 495, 69 S.E. 919. Cf. *The Associated Press v. Labor Board*, 301 U.S. 103. But where no legal right is created or jurisdiction granted to the court, no legal or equitable relief can be granted. *Penn-*

sylvania R.R. System v. Pennsylvania R.R. Co., 267 U.S. 203. *General Committee of Adjustment of the Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323; Cf. *Virginian Ry. Co. v. System Federation*, 300 U.S. 515. Equity follows the law, and "where there is no right to mesne profits at law, none can be recovered in equity." *Peter v. Hargraves*, 5 Gratt. (46 Va.) 12; 21 C.J., Equity Sec. 186, p. 198; 30 C.J.S. Equity, Sec. 103, p. 506. Furthermore, the granting of such ad interim wages, or damages, not having any basis in the statute, becomes punitive; to "vindicate public policy". (See Black's Law Dictionary, Exemplary Damages; Punitive Damages.) "The theory of exemplary, punitive, or vindictive damages . . . involves a blending of the interests of society in general with those of the aggrieved individual in particular. According to the more generally accepted doctrine such damages are awarded by way of punishment to the offender, and as a deterrent, warning or example to defendant and others . . .". 25 C.J.S., Damages, Sec. 117, pp. 705-6. "But the rule is well settled by the weight of authority that it is not the function of a court of equity to assess punitive damages in the absence of express statutory provisions and a court of equity will assess actual damages only as ancillary to equitable relief." *Capital Electric Power Ass'n v. McGuffee*, (Miss.) 83 So. 2d 837, 844; 56 A.L.R. 2d 405, 412; 19 Am. Jur., Equity Sec. 125, p. 125; 30 C.J.S., Equity, Sec. 72, p. 426; 25 C.J.S., Damages, Sec. 117, p. 709. "Ancillary" powers of equity refer to the exercise of legal powers in conjunction with equitable powers, sub-

ordinate to the principal equitable proceeding. See Black's Law Dictionary, Ancillary; 30 C.J.S., Equity, Sec. 11. Thus, while the remedies provided by Congress may, in the opinion of the Secretary, be inadequate to protect the employee and provide the most effective enforcement of the Act, yet they are such as Congress has seen fit to give and which it alone has the power to enlarge. The courts cannot take on the legislative function, although they may see the need for an amendment to the statute. *Globe Newspaper Co. v. Walker*, 210 U.S. 356.

The contempt cases, such as *Texas and N.O.R. Co. v. Railway Clerks*, 281 U.S. 548, are offered up by petitioner, and have been erroneously interpreted by some courts at times, as authority for the proposition that the court can provide relief or remedies even without a "mandate from Congress" (Petitioner's Brief, p. 10), but there is an obvious and basic distinction between the power of a court to issue an initial mandatory order (such as for damages not authorized by statute, or for defendant to perform an act he is not under legal obligation to perform) and the power to issue a mandatory order to restore the *status quo* existing prior to the violation of a previously issued injunction. A court may protect itself in its own decrees, 12 Am. Jur., Contempt, Secs. 40, 41, but this does not expand its power to decree. The court may punish for violation of its own mandates issued under jurisdictional authority, and although Congress has outlined the power of the courts in contempt proceedings (Act of June 25, 1948, c. 645, 62 Stat. 701, 18 U.S.C.A. 401), the power to punish

for contempt has been held to be inherent. *U.S. v. Hudson*, 7 Cranch. 32; See Anno. 117 Am. St. Rep. 950, 952, 953. Such power, whether inherent or ancillary, is necessary to the exercise of all other powers granted to the court; but all other powers must be granted. Such inherent power, therefore, cannot be called upon to expand the enforcement provisions in a statute.

Finally, the need for fuller protection to the employee and the need for this to implement enforcement, does not substitute for a grant of power. It must be recalled that the Fair Labor Standards Act was a departure from our traditional concepts of the master-servant relationship as well as the regulation of commerce. At that time Congress may well have intended to stop short of creating liability to the employee for discriminatory discharge, leaving the injunction as the sole remedy. Petitioner's argument that the fear of loss of wages will deter the employee from complaining and thus hinder the effective enforcement of the Act fails to take into account the fact that this is not such an unusual burden. The fact of delay is not the fault of the Act, but the fault of enforcement, at times, because of the normal delays in the courts. But the employee bears no greater burden in this respect than anyone who resorts to the courts to enforce legal rights. Almost every litigant is plagued by delays and resulting losses caused thereby. If this had been a situation Congress wanted to remedy, or guard against, certainly some language to this end would have been employed as in the National Labor Relations Act, Sec. 10(c) (29 U.S.C. A. 160(c)). Looking at petitioner's argument from the

other side a moment, the employer in *Phelps Dodge Corp. v. Labor Board*, *supra*, argued in its brief (85 L. ed at 1274) that it was helpless to guard against excessive awards of back pay (under the National Labor Relations Act) where representatives of the persons claiming to have been discriminated against delayed for more than two years before filing charges and the Board thereafter took an additional two and one-half years to dispose of the case; but the court, in its written opinion, completely ignored this plea, apparently dismissing it as one of the inevitable burdens of litigation. The resulting burden on the employee here, and the effect of this burden upon the administration of the Act, should be similarly treated until Congress decides that the need for a remedy exists and provides one. The existence of this problem confers no jurisdiction upon the district courts, nor does it expand the power of equity. Cf. *Thompson v. Allen County*, 115 U.S. 550.

3. *The O'Grady case.*

The reasoning and results in *Walling v. O'Grady*, *supra*, were based upon certain erroneous assumptions and concepts.

The *O'Grady* case first assumes that the employee had a legal right to recover damages, or ad interim wages, from the time of the discriminatory discharge until offer of reinstatement. Secondly, the court there saw little difference between granting "lost wages" ancillary to injunction and granting them following a contempt citation to restore the *status quo* previously

ordered by the court. Thirdly, O'Grady argues that the employee is left without adequate protection unless equity grants the lost wages. The decision grounds itself in these misconceptions and unwarranted assumptions, and having done so, finds the power to order payment of lost wages within the traditional inherent powers of equity to aid the "public interest", bringing itself into accord with Judge Woodrough in *Walling v. Miller*, *supra*, at 633. But the two cases are basically different, in that in *Miller* the assessment had a legal basis in the statute whereas in O'Grady there was no legal basis for the assessment. The *Miller* case held only that the district court had jurisdiction to allow unpaid minimum and overtime wages (actually worked for), in a suit by the Administrator for injunction, pursuant to a consent decree providing for such payment to the employee. There was no question as to the court's jurisdiction over the subject matter; it was provided for in Section 16 (b). The court, sitting in equity, took complete charge of the matter and disposed of all phases of the case by consent of the parties. No jury trial was involved. Judge Woodrough's concurring pronouncements, insofar as they permit a court of equity to dispose of the entire case using its ancillary power to resolve the legal aspects along with the equitable, are sound; but insofar as they would permit equity to create new rights and liabilities, and to assess penalties or punitive damages in the name of the "public interest" without specific statutory authority, they would be wrong. It was at this point that the court in O'Grady, after predicated its reasoning upon a series of mis-

conceptions, finally and completely detached itself from legal reality.

We, therefore, agree with the Fifth Circuit Court of Appeals that reliance in the *O'Grady* case on the cases cited by it was misplaced, and we conclude that the *O'Grady* case is unsound, having been based upon erroneous concepts of the law and having misapplied the powers of equity.

4. Other statutes and decisions thereunder.

Where petitioner finds no language granting the desired jurisdiction and power in the Fair Labor Standards Act, he calls upon other enactments and decisions thereunder in order to find this power for the district court. He relies heavily on the *Phelps Dodge* case in its construction and interpretation of the National Labor Relations Act. The National Labor Relations Act (Section 10 (c), 29 U.S.C.A. 160 (c) authorizes the Board "to take such affirmative action including reinstatement of employees, with or without back pay, as will effectuate the policies of this Act," demonstrating that the National Labor Relations Act intended to go much further than the Fair Labor Standards Act; in fact, the former is more comprehensive, dealing with a far more complicated and elusive subject matter than the latter. Its scope is broader and its enforcement machinery accordingly more extensive, as evidenced by a comparison of the two Acts—the definitions of "employee" (N.L.R.A., Sec. 2(3); F.L.S.A., Sec. 2(e); the "affecting commerce" of the National Labor Relations Act (Sec. 2(7)) as

against the "production of goods for commerce" of the Fair Labor Standards Act (Secs. 6 and 7); the "affirmative action . . . as will effectuate the policies of the Act" of the former (Sec. 10(c)) as against the "restrain violations" of the latter (Sec. 17). And the 1949 proviso to Section 17 evidenced the original Congressional intention to provide restricted and limited jurisdiction of the court to take affirmative action. The principal point in *Phelps Dodge* relied upon by petitioner is that the court permitted back pay to "employees" who were not "reinstated" but in fact "instated" (new employees), thus holding that the back pay provisions applied to persons who were refused employment because of their affiliation with the union, although they might have never been employees of the Company. But the authority for this holding is found clearly within the Act, wherein it is stated that "it shall be an unfair labor practice for an employer . . . by discrimination in regard to hire [emphasis supplied] or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." National Labor Relations Act, Sec. 8(3), 29 U.S.C.A. 158(3). The court had ample reason to hold that the word "hire" applied to discrimination against persons seeking initial employment, especially in view of the full language of the section covering all aspects of employment and the definition of "employee" (National Labor Relations Act, Sec. 2(3), 29 U.S.C.A. 152 (3)). Petitioner views this decision as having been based more in the necessity for "effectuating the policies of the Act" than in the language of the Act itself. But it is the

language used by Congress that constitutes the policy of the Act. Petitioner accuses the Fifth Circuit of misreading *Phelps Dodge*, but the Fifth Circuit seems to have found the specific language relied upon by this court in deciding *Phelps Dodge* and to have made a correct appraisal of the decision. Nor is petitioner's distinction between the "granting" of powers to a Board, on the one hand, and the "utilization" of the existing powers of the courts, on the other, a valid distinction, because Congress specifically outlines the jurisdiction of each in its enactments, and in the Fair Labor Standards Act has seen fit to grant limited jurisdiction to the district courts for the enforcement of that Act. It is certainly to be presumed that if Congress contemplated the award of damages for discriminatory discharge, or the payment of ad interim wages, it would have made some mention thereof, particularly in view of the fact that no such right ever existed at common law. For the same reason Congress was specific in the enactment of the National Labor Relations Act. The National Labor Relations Act was enacted before the Fair Labor Standards Act and in drafting the latter Congress had before it all of the language of the former, yet declined to provide for reinstatement "with back pay". The absence of such provision is significant.

While Congress may declare a policy "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom

of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection" (National Labor Relations Act, Sec. 1, 29 U.S.C.A. 151), on the one hand, and "to correct and as rapidly as practicable to eliminate the conditions [detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well being of workers] without substantially curtailing employment or earning power" (Fair Labor Standards Act, Secs. 2(a) and 2(b), 29 U.S.C.A. 202(a) and 202(b)), on the other hand, in each instance it goes further and specifically defines the measures to be taken to effectuate these policies. In each statute the machinery for effectuating the policy of the Act is fully described, and the exercise of any power by any board or court, the jurisdiction of which is defined or delimited by Congress, must be found in the Act itself in language more specific than the declaration of the policy of the Act.

The Antitrust decisions similarly find their basis in the language of the Antitrust laws. We will not dwell on these cases except to point out, for example, that the Antitrust Act (26 Stat. 209, Sec. 4, 15 U.S.C.A. 4) not only grants the district courts jurisdiction "to prevent and restrain violations" but goes further in describing the proceedings to be by way of petition setting forth the case and praying that such violation "shall be enjoined or otherwise prohibited". The acts to be prohibited are described in the Act, such as "contract, com-

bination in the form of trusts or otherwise, or conspiracy, in restraint of trade" (Antitrust Act, Sec. 1, 15 U.S.C.A. 1), attempt to "monopolize or combine or conspire" (Antitrust Act, Sec. 2, 15 U.S.C.A. 2). Under such authority the courts are permitted, as in *International Boxing Club v. U.S.*, 358 U.S. 242, to order dissolution, divestiture and enjoin or otherwise prohibit the existence of such restraints of trade; in fact, the courts are required to prohibit these things. Nevertheless, except for the forfeiture of property in transit, as specifically provided by the Act, (Sec. 5) the orders of court look to the future by undoing the present status. Where unjust or unlawful fruits have been taken by a party, they are wiped out, but this is specifically related to the existence of a condition—an unjust enrichment—, and is unlike a requirement that an employer pay for services not rendered to him. While the employee may have suffered for a while for the lack of work, the employer in such cases reaps no illegal fruits to be disgorged. The Antitrust cases make no effort to go beyond the authority of the Act, although that authority be granted in general terms. The apparent sweeping scope of the injunctions under the Antitrust Act includes only those prohibitions and mandates necessary to effect the primary order, to wipe out the conspiracy and prevent its further use.

Petitioner relies heavily on *Porter v. Warner, supra*. The Emergency Price Control Act granted the court the power to issue an injunction or "other order" enforcing compliance with the Act (Sec. 205, 56 Stat. 33, c. 26, 50 U.S.C.A. App. 925(a)), and provided for an action in

favor of the purchaser, or tenant, against a person selling, or renting, at prices above those authorized under the Act (50 U.S.C.A. App. 925(e)). The court in *Porter v. Warner, supra*, permitted equity to take charge of the subject matter and, ancillary to the injunction, grant "another order" making restitution of overcharged rent, just as the court ordered the restitution of unpaid overtime wages in *McComb v. Scerbo, supra*. In each case the right existed, and it was within the scope of equity, absent any prohibition in the Act, to adjudicate the matter in full and protect all of the parties. The Emergency Price Control Act provided that if the action were instituted by the administrator the buyer was thereafter barred from bringing the action for the same violation (Sec. 205), answering the question raised by Justice L. Hand in the *Scerbo* case in his concurring opinion. The rights created by a statute, and the remedies for the enforcement of those rights, are usually exclusive. *Globe Newspaper Co. v. Walker, supra*. Further, this was "emergency" legislation "passed and interpreted in time of a struggle for national existence. These laws are now in abeyance and they constitute doubtful precedent for the extension of enactments such as this which are intended to represent permanent policy in peaceful times as well." *U. S. v. Parkinson*, 240 F.2d 918. The proviso to Section 17 of the Fair Labor Standards Act indicates a policy, however, that the remedies provided for in the statute should not be coupled together in the same action. The restitution of excess rent gave to the tenant what was lawfully his under a right specifically created by statute, and

if he did not recover it himself, the administrator could disgorge the illegal fruits for the Treasury. Both remedies went to prevent inflation. But the granting of ad interim wages gives to the employee something he is not of right entitled to, and penalizes the employer in addition to the other penalties fixed by the Act.

We conclude, and urge the proposition, that Congress specifically included within the penalty and enforcement provisions of the Fair Labor Standards Act all of the sanctions and remedies intended, and that it did not intend to proclaim a "policy of, or create a right to, damages for discharge, enforceable in any kind of proceeding, either for the relief of the employee or the vindication of public policy.

B.

If the district courts previously had the power, under Section 17, to order reimbursement for loss of wages resulting from unlawful discriminatory discharge of employees in violation of Section 15 (a)(3) of the Act, such jurisdiction has now been withdrawn under the proviso added to Section 17 of the Act by the 1949 amendment.

Petitioner contends (Petitioner's Brief, p. 35) and the Circuit Court indicated (R.20) that the 1949 proviso to Section 17 dealt solely with the minimum wage and overtime compensation provisions—wages actually worked for. However, if damages, or lost wages, were to be granted to the discharged employee, we believe that petitioner would contend for nothing less than the minimum wages prescribed in the Act. Nothing short

of this would make the employee whole if he had the right to recover. The proviso also prohibits "liquidated damages" being granted in injunction cases, and we think that it may well be broad enough to include any damages or lost wages to which the employee might be entitled under this Act, interpreting it even without reference to its legislative history. Certainly if, as petitioner contends, the "strangers" in *Phelps Dodge* became "employees" merely by virtue of the "policies of the Act", without more, (Petitioner's Brief., p. 28), then the "lost wages" in this case may as easily become "unpaid minimum wages" referred to in the proviso, and thereby withdrawn from the power of the court of equity to grant under Section 17. As pointed out elsewhere in this brief, we do not think the scope and machinery of the Fair Labor Standards Act are nearly so broad and comprehensive as that of the National Labor Relations Act, and we find decisions such as *Phelps Dodge* well grounded in the specific language of the statute, all of which goes to make up the "policies of the Act", rather than being grounded in a mere general policy or purpose without further implementation. But following petitioner's reasoning, wherein he finds powers in that "circumambient aura, so often euphemistically described as 'the policy of the statute'" (L. Hand concurring in *McComb v. Scerbo*, *supra*, at 141), there would be no reason to exclude "lost wages" from the proviso to Section 17 of the Fair Labor Standards Act. If petitioner's approach is available to find power or meaning in a statute, then we think the above logic should prevail in this case.

But we think better logic is available to interpret the proviso as limiting the court's jurisdiction in injunction cases so as to prevent the kind of order sought here by petitioner. The *O'Grady* case was in effect reversed by the proviso. As stated in the Conference Report as given in the Statement of the Managers on the Part of the House, Rept. No. 1453 on H.R. 5856, 81st Cong., 1st Sess. p. 32, U.S. Code Congressional Service, 1949, p. 2251, 2273: "The [proviso], however, will have the effect of reversing such decisions [emphasis supplied] as *McComb v. Scerbo* . . . in which the court included a restitution order in an injunction decree granted under Section 17." *O'Grady* and *Scerbo* both dealt with a "restitution order", the former assuming a right in the discharged employee to recover ad interim wages. Neither saw but little difference between giving reparation as ancillary to injunctive relief and giving back pay where an injunction has been violated as in the *Railway Clerks* case. Both relied on *Welling v. Miller*, *supra*, particularly the concurring opinion of Judge Woodrough who found the power to grant the wages (actually worked for in the *Miller* case) within the traditional powers of equity "to restrain". In fact, the court in *Scerbo* stated that the cases were indistinguishable (at p. 138). While the facts of the cases differ, this is true in that both cases involved the power to issue a "restitution" order—the very target of the proviso. Furthermore, Congress was certainly well aware of the indistinguishable reasoning and philosophy of the *Miller*, *O'Grady* and *Scerbo* cases; and the reference to "such decisions" as *Scerbo* in the

legislative history of the proviso (Conference Report, *supra*) must certainly have included *Miller* and *O'Grady*; otherwise, the words "such decisions" would be void of meaning, because these are about the only such decisions.

Petitioner says that the insertion of Section 16(c) leaves no doubt but that the proviso related only to the compensation provisions; but, upon the same reasoning, the failure to provide specifically for award of ad interim wages and their recovery seems to indicate the intention to omit such right and remedy. The rights created by statute, and the remedies for enforcement of those rights are usually exclusive. *Globe Newspaper Co. v. Walker*, *supra*. Furthermore, the Conference Report specifically recognized the continuing authority of the court in contempt proceedings for enforcement of injunctions issued under Section 17 for violations occurring subsequent to the issuance of such injunctions. The Report seems to be fairly comprehensive and would not have purposely been silent as to the *O'Grady* situation, and the most logical disposition of that case seems, without much question, to have been within the words "such decisions". As in construing a statute, all the words used by the Congress (or by the Conference Committee in this instance) must be attributed some meaning.

II.

If the power exists in the district court to order reimbursement for loss of wages resulting from unlawful discriminatory discharge of employees in violation of Section 15 (a)(3) of the Act in suits for injunction brought by the Secretary of Labor, the court, sitting as a court of equity in such cases, is not deprived of discretion in granting or denying such wages or damages.

Petitioner indicates that it may be mandatory on the court in this case to grant reimbursement to the employees for wages lost because of the discriminatory discharge. (Petitioner's Brief, p. 34, fn. 14.) He questions whether or not the court has any discretion to refrain from ordering restitution in certain cases. But petitioner, throughout his argument, calls upon the broad, comprehensive, traditional powers of equity as the basis for the power sought in this case for the district court; yet at the same time would question the power of a court of equity to exercise discretion—perhaps equity's broadest, most comprehensive and most traditional power; in fact the very essence of equity. Certainly "an appeal to the equity jurisdiction conferred on district court is an appeal to the sound discretion which guides the determinations of courts of equity." *Meredith v. Winter Haven*, 320 U.S. 228. This is true even under emergency legislation, such as the Emergency Price Control Act, where the national problems therein dealt with are urgent and require careful and immediate attention through the machinery of the Act. See *Hecht Co. v. Bowles*, 321 U.S. 321. An injunction may not issue as a routine, absolute consequence of a

finding of non-compliance, but may be denied in the sound discretion of the Judge. *Mitchell v. Hodges Contracting Co.*, 238 F.2d 380. See *Mitchell v. Bland*, 241 F.2d 808.

Petitioner states that the court found no mitigating circumstances with respect either to the unlawful discrimination or the resulting wage losses (Petitioner's Brief, pp. 5, 35). This does not seem to be a question to be argued before this court, particularly in view of the printed record here which contains none of the transcript of the testimony. As we have heretofore pointed out, the testimony considered by the District Judge in this case consumed the better part of a week. He declined, in the exercise of the court's discretion, to order reimbursement for lost wages (R.12). While we will not argue abuse of discretion, it may be well to observe in the light of petitioner's indication that in this case an order for lost wages should be mandatory, that the issue in such cases as this is not whether the employee should be reimbursed but rather, under the court's power, what should be done with the employer in the light of the overall circumstances and in the interest of all concerned—the employee, the other employees in the plant, the employer, the community, and the government. Many factors must be considered by the court of equity: the financial position of the employer, the degree to which he has been penalized financially (as in this case, where the employers here have been fined \$4,900.00), (R.30, 31), and where wage cases were pending against the employer in large

amounts, (*Mitchell v. Robert DeMario Jewelry, Inc., et al.*, Civil Action Nos. 649 and 654, U.S.D.C., Middle District of Georgia), the effect of such order upon the stability of the employer, and for that matter upon the stability of the employee, and even the attitudes of the parties as discerned by the court. All such factors must be considered if the court is to effectuate the policy of the Act. It becomes obvious that a court of equity must exercise its discretion.

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,
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